Smith, Jeremiah
Notes on Course of Equity

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The Written Law consists of the Constitution and the Statutes.

The Common Law consists of the decisions made by the judges, that is, is to be found in the reports of the decided cases.

It is neither necessary nor possible to have a case on every point of law which may arise, but one should know the principles upon which the cases have been decided which have already arisen, and should apply those principles to all cases as they come up.

Formerly students of law were put to studying its principles from text books. In our system we work out the principles from decided cases, and then read what the text writers have drawn out of the same cases.

A Tort is a wrong not arising by mere breach of contract and for which there is a remedy by a civil action at the suit of the party injured. A crime generally involves a Tort but a Tort does not necessarily include a crime. A Tort is not a mere breach of contract, but there may be a Tort in connection with a breach of contract.

BOOKS ON TORTS.

Thirty years ago Chitty on Pleading was the best book on torts. Today there are several good works:-

AMERICAN BOOKS. Cooley on Torts.
Non-Contract Law ------- Bishop.
Bigelow's Elements of the Law on Torts.

ENGLISH BOOKS. Pollock on Torts.
Clerk and Lindsell on Torts.

Pollock is the best text book for our purposes. Clerk and Lindsell will be often referred to.

Chapter 1. Trespass.
Section 1. Assault.

1. De S. and wife v. T. De S. At the Assizes, 1442 or 1449.

T. came to S's tavern at night after wine and pounded on the door with a hatchet, the door being closed. S's wife put her head out at a window and told him to stop, and he struck at her with the hatchet but did not hit her. HELD, an assault nevertheless, for there was reasonable apprehension of physical harm, though none actually inflicted.

The inquest is about the same as the modern jury. The harm done was the frightening of the female plff. The last sentence of the opinion was by the reporter.

Tuberville v. Savage P. 2, King's Bench, 1669.

Deft., to justify a battery on Plff. showed that Plff. putting his hand on his sword, said "If it were not assize-time, I would not take such language from you"; HELD, no justification; for, where no PRESENT intention to inflict harm appears, there is no assault.

The act was a threatening one, but the language accompanying it showed that there was no intention to assault. Words are not the only thing that would show the absence of such intent. It might be otherwise indicated by an act. But the absence of intent does not excuse negligence.

MORRIN v. SHOPPEE P. C., Nisi Prius, 1848.

Deft. rode after Plff. rapidly, causing him to take refuge in his garden. Deft. used threatening language, "Come out and I will lick you before your own servants." HELD, an assault as it put Plff. in terror and caused him to flee.

Although there was no physical injury the apprehension or fear of it caused the Plff. was enough to constitute an assault. Case is in line with the preceding two to show that actual physical contact is not necessary.

STEPHENS v. WYERS P. C. Nisi Prius, 1820.

Plff. was chairman of a meeting. Deft. was boisterous and on motion it was voted to expel him from the room. He said he would pull the chairman from his seat before he would be expelled from the room, and immediately advanced with his fist clenched toward the chairman, but was stopped by the churchwarden, who sat next but one to the chairman, at a time when he was not near enough for any blow he might have meditated to have reached the chairman, but the witnesses said that it seemed to them that he was advancing with an intention to strike the chairman. HELD, if he was so advancing that, within a second or two of time, he would have reached the Plff., it is an assault.

This case shows that there must be not only words evidencing an intention to assault, but also present ability to carry the intention into effect, and something done in pursuance of the intention.

To sum up the cases thus far, physical contract is not necessary to constitute an assault. 1. De C. and Wife v. W. De C. and Martin v. Shoppee. There must be an intention to assault. Tuberville v. Savage. There must be present ability to carry the intention into effect, and something done towards carrying it into effect. Stephens v. Myers.

HEAD v. COCKEN, P. C. Common Pleas, 1884. Deft. and his men surrounded Plff. and, with sleeves and aprons tucked up, threatened to break his neck if he didn't leave the room. He left. HELD, that there was an assault, as there was a threat of violence exhibiting an intention to assault, and a present ability to carry the threat into execution.

This case introduces another element, viz., the reasonableness of the apprehension of violence. There must be reasonable apprehension of violence. Threats are not sufficient. Acts must accompany them looking to immediate violence. Words may explain an otherwise doubtful action. In this case the doubt was whether it was a reasonable fear.

A "rule nisi" is a conditional order of the court, an order which will become final unless good cause be shown why it should not. Notice is then served on opposite party.

In abstracts, it is generally best to state briefly how the question came before the court. Two or three technical words. Also the nature of action, and of Deft.'s plea. Then give just enough facts to make the point of law clear. Then the point decided and the reason of the decision.

Read v. Coker is also reported 17 Jurist 990 and 22 L.J., N.S. 201.

The reasonableness of Plff's apprehension is a question of fact for the jury. Mere words do not constitute an assault, but they are admitted to give character to acts.

OSBORN v. VEITCH, P. 7, Nisi Prius, 1858.

Defts. were walking with loaded guns at half-cock in their hands in a field of plaintiff's. On refusing to withdraw, and being approached by Plff. they pointed their guns toward the latter, and threatened to shoot. HELD, to be an assault, as pointing a loaded gun at a person is in law an assault.

The kind of intent necessary to constitute an assault is the reasonable intent gathered by the plff. from the external surrounding circumstances and not "the hidden intent" of the party assaulting. Here Plff. would naturally suppose the guns were loaded.

UNITED STATES v. Richardson, P. 6, U.S.Circuit Court, 1847.

Deft. came into a house where Mrs. Shelton was sitting, and raising a club over her head, threatened to strike her if she said a word. HELD, to be an assault, as Deft.'s language showed his intent to strike upon violation of a condition which he had no right to impose.

This was an indictment for a criminal assault, but the rule of law would have been the same had the action been a civil one.

BEACH v. Hancock, P. 8, New Hampshire, 1858.

Deft. pointed a gun at Plff. in an excited and threatening manner. Plff. did not know whether or not the gun was loaded, and in fact the gun was not loaded. HELD, that it was an assault, on account of the very reasonable fear produced.

There is no present ability to harm bodily. Why was Deft. liable? He had ability to create fear.

"It is an assault if the Plff. had reasonable cause to believe gun loaded and Plff. was actually put in fear of receiving bodily injuries therefrom, and the circumstances of the case were such as ordinarily to produce such fear in mind of reasonable man." This was held to be law in 110 Mass. 408 and 2 Humph. (Penn.) 457.

Compare this case with Osborne v. Veitch. They show what kind of an intention is necessary.

Suppose the following cases:-

(a) The gun was not loaded and Plff. knew it and the Deft. thinking however that it was loaded, snapped it at the plaintiff. An action for assault would probably lie.

(b) A is weak, and B is strong; B anticipates a blow from A, when in an altercation with him. Here an action for assault would lie. The fear or apprehension necessary to make an act an assault does

not necessarily have to be a craven fear. It is sufficient if it is merely apprehension of physical contact.

(c) A is blind; B intends to kill him, and snaps a gun at him. Gun does not go off. A does not know of this fact, but when told of it later, brings an action for assault. Could the action lie here?

1. On the ground of present ability, or means, the action would lie.

2. On the ground of apprehension the action would not lie, but Professor Smith thinks an action lies.

STEARNS and WIFE v. SAMPSON, P. 11, Maine, 1871.

Deft. as landlord gave notice to Mrs. Stearns, his tenant, to leave his house. She refused. Whereupon Deft. and his men removed furniture, took out windows, prevented food from being brought, let in a dog, etc., so that Mrs. Stearns finally left by compulsion with an officer and was sick several weeks. HELD, there was no assault. Indignities which embarrass and distress may not constitute assault.

Words do not constitute an assault and embarrassing acts do not necessarily constitute an assault.

In criminal cases, the ground for conviction for assault is usually the same as would sustain a civil action. Words indicating intention to assault are not actionable, because Deft. can be put under bonds to keep the peace, and because it would cause the bringing of frivolous actions.

VICTORIAN RAILWAYS COMMISSIONERS, Defts. and JAMES COULTAS and MARY COULTAS, Plaintiffs, P. 19, Privy Council, 1888.

Defendants (husband and wife) were driving one evening. Coming to a railway crossing they found the gates closed. The gate-keeper opened the nearest, and then walked over to the other. Deft. followed. A train was coming along at great speed; Deft. barely escaped being hurt. Mrs. Coultas fainted, and the shock caused a considerable illness. After suing and winning their case in the lower court, this case came up on appeal. HELD, that the dangers were too remote. The English law of negligence is that the damages must be the natural and reasonable result of Deft's act; such a consequence as in the ordinary course of things would flow from the act. The nervous shock in this case was not such a consequence.

See full report of this case in 13 Vict. L.R. 895, in which is stated an important fact omitted in the report of Privy Council in 13 Ap. Cas. 229, viz., that "the female plaintiff received a severe shock, which brought on a miscarriage."

Query: Does not a nervous shock involve physical injury?

In such an action as this, it is necessary to prove:

(a) That the defendant was negligent; and (b) that the negligence caused the damage; and (c) that the damage so caused by defendant to plaintiff is of a kind of which the law will take notice, and for which it will afford redress in a civil action. As to (c) see 3 Harvard Law Review, 203, 204.

If mere mental pain is caused, it is ground of action if intentional. Query: Is it so if caused by negligence?

It is not true to say that the law does not allow a recovery for mere mental fear, as is shown in cases of assault. In assaults however, the fear is intentionally caused.

Privy Council said that the damages must be the reasonable result of defendant's act.

As contra to Coultas case, see: 76 Texas, 210, 48 Minn., 184, 25 N. Y. Supp., 744.

As almost accord, see 88 Tex. 412.

As to telegraph cases (mental anguish caused by delay of message see: 97 Mis. 1, 55 Fed. Rep. 809, 9 Lewis Amer. R.R.& C. Rep. 770 - 773.

See also, Innes on Torts: harm to person sec. 17.

The court held that a nervous shock was a mental injury and that for a mental injury a plff. cannot recover. This latter is contra to telegraph cases which hold that for a mental injury Plff. may recover.

In this case there was no intent to harm. So the Question arises may negligence create liability for assault? Most certainly it may. In the great majority of cases to that effect there is however intent to injure.

In addition to references cited by note, and in opposition to decision is 25 N.Y.Supplement 744.

Innes on Torts, Section 17 discusses this principle thoroughly. He says, "Injury to person consists of harm to body or mind, provided that the prejudicial effect, so termed, is a physical condition, capable of being tested, and is manifested."

The telegraph cases are reported 55 Fed. Rep. 809 and 57 N.Y.Reporter 973.

Section 2, Battery, Cole v. Turner, P. 17, Nisi Prius, 1704

Holt,C.J. declared that the least touching of another in anger is battery; that a gentle touch without violence or design of harm is no battery, and that violence used in a rude or inordinate manner is a battery.

The idea of hostility is involved in the decision of Cole v. Turner. A slight touch, without violence or malice, is permitted by usages of society.

Gibbons v. Pepper P. 17, King's Bench, 1695.

Trespass, assault, and battery. Deft. pleaded his horse ran away, and, through no fault of his, injured the plaintiff. Plff. demurred. HELD, that as, if a man riding a horse injures a bystander, he is liable only if accident resulted from his own fault, Deft. should have given this justification in evidence, upon the general issue pleaded. He did not, so judgment must be given for plaintiff.

Deft's plea amounts to the general issue. He virtually said that the act was not his act. Accordingly he could not plead in justification of an offense which he had not committed. The case was lost on technical grounds, Plff. having pleaded in justification instead of the general issue.

This case is also reported in Ames cases on pleading P. 58.

Holmes and Wife v. Mather, P. 19, Exchequer, 1875.

Deft., with a groom as driver, were out with a pair of horses. The animals became frightened and unmanageable. After running a long distance they finally came to a corner, where they must turn or run into house opposite. Groom pulled hard on right rein but could not quite bring them around; a smash-up resulted and female Plff. was knocked down and badly injured. A verdict for the Plff. having been granted, and a rule nisi having been obtained, it was HELD, that the accident was not caused by act of Plff., but happened in spite of him. An accident which driver of runaway horses is doing his best to prevent is not actionable. Rule discharged.

True test of battery is not whether a hostile intent on the part of the Deft. but whether an absence of consent on the part of the Plff. can be inferred. Clerk and Lindsell on Torts, P. 121.

In Holmes v. Mather there is no choice of things to run into made by Deft.

Innes v. Wylie P. 24, Nisi Prius, 1844.

Assault. Plff. undertook to enter a room where a society was dining, and was prevented from entering by a policeman, who acted at orders of Deft. HELD, that if policeman was entirely passive in obstructing Plff's entrance, there was no assault. If he took active measures, there was.

Here passive obstruction is not an assault. -- Pollock.

Had Plff. alleged exclusion, he would have been entitled to an action, but not for assault. Plff. must prove what he alleges, otherwise thrown out for "variance."

Coward v. Baddeley, P. 24, Exchequer, 1859.

Assault and giving Plff. into custody of police. Deft. was directing a stream from a hose on a fire. Plff. thought he wasn't doing his work well, so began to give advice. Finally laid hands on Deft. to attract his attention. Thereupon Deft. gave him over to a policeman and he was imprisoned and taken before magistrates. Deft. pleads Plff's as-

[illegible]

There is no doubt but that Plff. laid hands on Deft., but jury said that it was not done hostilely. The Ct. said that touching a man to attract his attention was not an assault and battery, such as will support a criminal prosecution or justify an arrest. Court did not settle at all the question of civil damages, but only the criminal liability. In this case the act of Plff. was without any implied license from the fireman to touch him. There was more force than was necessary, so Plff. was liable.

Hostile intent is not necessary for a civil battery.

Clerk and Lindsell on Torts P. 121 say the true test is not whether a hostile intent on part of Deft., but whether an absence of consent on

the part of the Plff. can be inferred.

If touched on shoulder by friend to attract attention it is no trespass, if within ordinary customs or usages of society.

Original Writ. p. 27.

Throwing any liquid upon a person would be an assault and battery.

See the note on Ames on p. 27.

Battery does not necessarily mean an injury inflicted by an instrument held in the hand. It may be thrown, shot, etc. It has been held that the following are trespasses to the person:-

1. Injury to the clothes on the back.
2. Removing an ulster from the Plff.
3. Striking a cane in the Plff's hand.
4. Cutting a rope connected to the Plff's slave and Plff.

Dubuc De Marentille v. James Oliver, p. 27, New Jersey, 1809. Plff. was out driving. Deft. struck his horse violently with a large stick. On trial for assault before a Justice of the Peace, Plff. was given damages. Assigned for error that action for assault cannot be supported before a Justice of the Peace. In the upper court it was HELD, that act of Deft. certainly was an assault on the person of the Plff. and so the Justice had no jurisdiction. If trespass on property had been charged, Plff. would have had to show injury to horse. Judgment reversed. Supposed Case:

B, standing behind A, and within shooting distance, fires a loaded gun at A, intending to kill him, but does not hit him. A, who is stone deaf, is not made aware of the attempt of B, until the next day, when he is informed of it by a letter from a bystander.

Can A maintain an action (civil) against B?

See Pollock on Torts, 3rd Ed. 1[illegible], Note [illegible],

See Bigelow Ele. of Torts, 4th Ed. 1[illegible], note [illegible].

DEFINITIONS.

BATTERY.

Bigelow, (p.1[illegible]) "A battery consists in the unpermitted application of force by one man to the person of another."

SALM. (p.1[illegible]) "A owes to B the duty to forebear to hit or touch him in anger, rudeness or negligence, or in the commission of an unlawful act."

PROF. Jeremiah Smith says, "Battery is the unpermitted application of force by one man to the person of another, directly or indirectly, either hostilely or rudely though without damage, or negligently with damage." Force is physical contact. Unpermitted, is not permitted either by the plaintiff or by the law. See for other definitions, Cooley on Torts, p. 18[illegible]. Bigelow, Elements of Torts, 4th Ed. p. 1[illegible].

ASSAULTS.

Vol. 2, Bishop's New Criminal Law, Sec. 2[illegible], is best definition.

"An assault is any physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being."

PROF. Smith, (rounded on foregoing), "An assault is any physical force, partly or fully set in motion (unlawfully) by a human being, creating on the part of another human being, a reasonable apprehension of immediate unpermitted physical contact (with himself)."

For other definitions of assault, see Cooley on Torts p. 160, which seems to exclude "negligence."

PROF. Smith suggests, that on a bar examination, he would add to his definition, that the candidate was perfectly aware that by an assault was ordinarily understood to be included the idea of hostile intent, and by a battery was ordinarily understood to be included as a necessary element anger or rudeness, but that the candidate was trying to give something more than a mere technical definition, and had in mind what is an actual violation of the right of personal safety, and therefore extended the terms of assault and battery to these actions.

In Innes on Torts it is said, "A man is not said to intrude upon the person of another, when his conduct is not hostile or insulting, and the damage done is of such a character that it will not be resented by a person of ordinary sense and temper."

JONES v. WYLIE: Mere passive obstruction is not an assault.

COMMO v. BAWDLEY: Test is absence of consent. See Clerk and Lindsell, p. 121, as to actions for wrongful contact. "The true test is not whether a hostile intent on the part of the defendant, but whether an absence of consent on the part of the plaintiff." C.& L.

See Stephen's Digest of Criminal Law, Art. 241. "Such acts as are reasonably necessary for the common intercourse of life are not assaults or batteries, if they are done for the purpose of intercourse only, and with no greater force than the occasion requires."

See also Pollock on Torts, 2nd Ed. p. 190.

QUERY: Define the right to personal safety, for the violation of which the law affords a remedy by a civil action, dropping the terms of "assault" and "battery". Elements of answer are:

1. Freedom from hostile or rude contact, even if without damage.

2. Freedom from negligent contact resulting in actual physical harm; otherwise expressed as,- negligent contact with damage.

3. Freedom from reasonable fear of immediate (unpermitted) physical contact, when such fear is occasioned by the acts of another, and not by words only.

N.B. If we include the "deaf man's case", we must add; - Freedom from appreciable immediate peril, intentionally caused by the hostile act of another, even though such act is unknown at the time to the person in peril.

Section F, Imprisonment, p. 80, Note by Thorpe, C.J., 1948.

There is said to be an imprisonment in any case where one is arrested by force and against his will, although it be on the high street or elsewhere, and not in a house, etc.

GRANTS v. SPARKS, p. 80, King's Bench, 1704.

Bailiff with a warrant for F's arrest approached him and told him

that he had a warrant. Whereupon D kept him from touching him, and retreated into his house. And it was attempted to show that P was in contempt of court. HELD, bare words will not make an arrest. To make the arrest there must be a physical touching, or what is tantamount, a power of taking immediate possession of the body, and the party's submission thereto.

RUSSEN v. LUCAS, p. 41, nisi prius, 1824.

Action against sheriff for an escape. Question whether person was arrested or not. Officer went to him and said, "Mr. Hamer, I want you." Hamer told him to wait outside and he would join him. Officer went out and Hamer escaped.

Mere words not submitted to, do not constitute an imprisonment. This action was brought for an escape, and not for failing to use due diligence to make an arrest. Plff. should have brought an action on the case for not using due diligence, or for improperly failing to arrest. Plff. could have brought the latter action, even after bringing the one he did in this case. False imprisonment is the unlawful imposition of restraint upon a person against his will whereby he is entirely or in large part deprived of his natural liberty of action.

If Hamer had gone with the officer, the arrest would have been good. Acquiescence alone is not sufficient, but that together with an act signifying acquiescence is sufficient.

WOOD v. LANE and ANOTHER, p. 41, Nisi Prius, 1824.

Plff. was in a store. Cleaton came in and demanded money Plff. owed him. On being refused he went out and returned with Lane, his attorney's clerk. Pointed to Plff. and said, "This is the man." Plff. said, "I suppose I am to go with you," and being assured in the affirmative he went out with them. As a matter of fact deft. had no power to arrest Plff. HELD, that if you order a man to go with you, and he goes, against his will, thinking you have power to force him to do so, it is an arrest. The question is whether he goes voluntarily or involuntarily.

It was decided that an arrest can be made without touching a man. If a man being ordered to do so goes with another, supposing that other to have the power to force him to do so, it would be an arrest, though an unlawful one, if the person making the arrest had not the lawful authority to make such arrest.

PIKE v. HANCOCK, p. 29, New Hampshire, 1829.

Trespass for assault and false imprisonment. Defts. were Selectmen of a town. They assessed a list of taxes and appointed a Collector. Latter was in room with Plff. and after she had refused to pay her tax until she was arrested, he told her that he arrested her. Then she paid. HELD, that in ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, as in this case.

Words uttered with ability to enforce, and submitted to, constitute an arrest.

The case of Herring v. Boyle was omitted, but it seems to lay down that the presence of the party supposed to be imprisoned, and his cognizance of such restraint, is necessary. The party must be unwilling to go,

Court he may go voluntarily.

[illegible] v. [illegible], U. S. Circuit Court, Missouri, 1888.

For two weeks Plff. was constantly guarded by detectives employed by Deft. At no time was he free to come and go as he pleased. Constantly examined and cross-examined touching the robbery, clearly showing that he was regarded as a criminal, and that force would be used if he tried to escape. In fact he was deprived of all real freedom of action. HELD, to be unlawful imprisonment.

BIRD v. JONES, p. 98, Queen's Bench, 1845.

Part of highway was enclosed for spectators of a boat race, who paid for their seats. Plff. came along and wished to pass through. He was checked, but after a short struggle, got in. Two policemen were then stationed to keep him from going any farther. He remained where he was, although informed that he might go out in any other way. HELD, by a majority of the court, that to call this imprisonment would be to confound partial obstruction and disturbance with total obstruction and detention. To constitute imprisonment a man's liberty must be annihilated, not limited merely. Lord Denman dissented, considering imprisonment to be any restraint of a man's person by force.

Majority of the court held, that there was not a substantial total deprivation of liberty.

SEE Innes v. Wylie, ante.

In supposed case of a person, shut up in a room with all egress shut off, except that by lifting latch of a window, the same will open. SEE "Breaking" in burglary, 2 Bishop's New Criminal Law, Sec. 19, as to whether it would be right to lift latch.

As to false imprisonment, see 14 New So. Wales Rep., 284,

As to false imprisonment definition, see Bishop's Non-Contract Law, Sec. 208, see Bigelow, Ele. of Torts, 4 Ed., p. 147.

The word "false" is not used with respect to the merits of the charge against the prisoner, but it relates to the validity and legality of the authority under which the imprisonment is attempted to be justified. Bishop, on Non-Contract Law, Sec. 220, in speaking of malicious prosecution, says, that malicious prosecution consists of the unjustifiable use of the processes of the law, while false imprisonment is an act done in violation of those processes.

SEE celebrated sentence in Note to 1 Saunders Rep. 346 b: "Wherever any act injures another's right, and would be evidence in the future in favor of the wrongdoer, an action may be maintained for an invasion of the right without proof of any specific injury." SEE remarks of Lord Coleridge, in 4 Q.B.D. & E., 640

If there are other means of egress from prison it is not imprisonment, if those means are reasonably safe.

ELIZABETH A. PAYSON v. PERRY B. WOODBRIDGE, p. 40, Mass., 1861.

By representations and threats of prosecution, and by paying her expenses, Deft. induced Plff. to go away during a certain divorce suit; but

she became satisfied Deft. was deceiving her and so returned and testified in the suit. In this action for abduction and false imprisonment, it was HELD, that as Deft. did not use force or threats of force, and as Plff. yielded voluntarily to his misrepresentations, there was no ground of action for false imprisonment.

There was no force or threat of force, so there was no false imprisonment. The person was not caused to depart against her will.

Definite limits are necessary in every direction in order to constitute imprisonment.

SEE 18 New So. Wales Cases of Law 252, case of sheriff set adrift on a steamer.

There must be a complete restraint of liberty; it is not false imprisonment if one door to a room is closed if another is left open. But if a person has certain limits set for him beyond which he cannot go, it is false imprisonment, even if he has considerable freedom of movement within these limits. A man is not imprisoned so long as there is a means of egress, provided (1st) that it does remain open in the sense of being visible or apparent or readily discoverable by an average man; (2nd) that this means of egress can be used without applying physical force to this means or place of confinement, and (3rd) is such that an ordinary man can use it without serious peril of life or limb, and with reasonable hope of success.

Bishop, Non-Contract Law, Sec. 287, says in Bird v. Jones, no imprisonment, but an actionable wrong, however not the wrong to which law applies term, false imprisonment.

Bishop, Non-Contract Law, Sec. 306. Imprisonment is any unlawful physical restraint by one of another's liberties, whether in a prison or elsewhere, in a place stationary or moving, under claim of authority or not, by bolt and bars, by threat overpowering the will or by any other means.

Two questions, (1) how may restraint be imposed? (2) Is actual contact necessary or not? Not. Restraint may be imposed either by use of physical force, or submission to such threat, in case there is a reasonable apprehension that force will be used at once in case submission is not immediate.

How great must the restraint be? Must be unlawful restraint of motion in every direction within some limit wide or narrow, defined by the will of another.

R.& R.C.C. L.R. 458.

Bigelow, 4th Ed. Sec. 197. Breaking into a place requires the separation of the walls; as, opening a window or a door,

A guilty man arrested, on a void warrant is falsely imprisoned. An innocent man arrested on a proper warrant is not falsely imprisoned. He may have an action for malicious prosecution.

Malicious prosecution consists of an unjustifiable employment of the processes of the law. False imprisonment is an act done in violation of those processes.

25 Atlantic Reporter 894.

35 Nebraska 898.

Section 4, Trespass upon Real Property, Smith v. Stone, p. 43, King's Bench, 1647.

Trespass. Plea. Deft. was carried forcibly by others on land of Plff. Plff.\demurred. HELD, that it was trespass of parties who carried him, not trespass of deft.

Are the doctrines of the common law concerning trespass on real property founded in the nature of things, or are they mere accidents of legal history?

Keep this question in mind.

Pickering v. Rudd, p. 42, does not decide anything.

ELLIS v. THE LOCKPORT IRON COMPANY, p. 44, Common Pleas, 1874.

Plff. and Deft. occupied adjacent pieces of land, between which was a wire fence. Plff. used his land for pasturing his horses. One day Deft. turned a stallion into its land. It had done so before, but had always watched him. This time it did not. One of Plff's mares was close to fence, and deft's stallion kicked and bit her. Thereupon Plff. brought this action of trespass. HELD, that as some portion of deft's horse must have been over the boundary, it was a trespass, no matter how small the portion. Not necessary to prove negligence in case of man's animals, any more than in case of man himself.

Touching a horse on a man's land is the same as touching the land itself.

It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in a balloon, or to cause a material object, as shot fired from a gun, to pass over it. Lord Ellenborough thought it was not in itself a trespass to interfere with the column of air superincumbent upon the close, and that the remedy would be an action on the case for an actual damage; though he had no difficulty in holding that a man is a trespasser who fires a gun on his own land so that the shot falls on his neighbor's land. (4 Camp. 219, 221). Fifty years later Lord Blackburn inclined to think differently, and his opinion seems to be the better.

DOUGHERTY v. STAPP, p. 47, North Carolina, 1885.

Trespass quare clausum fregit. Deft. entered on unenclosed land of Plff. with other men and surveyed part of it, without marking trees or cutting bushes.

Lower court held no trespass. In the upper court it was HELD, that while amount of damages may depend on the acts done on the land, it is an elementary principle that mere unauthorized entry constitutes trespass.

There is no more right to go on unenclosed land than on enclosed.

Many states have statutes, providing that, in cases of trespass, where no substantial damages are awarded the Plff., the costs of suit should be borne by the Plff., except in cases where a title is in dispute.

SECTION 5, Trespass upon Personal Property, p. 49, Marlow v. Pickes, Common Pleas, 1744.

Trespass for assaulting, beating and wounding Plff's mare. Verdict for Plff. Deft. moved in arrest of judgment. HELD, that while assault upon a dead thing, as a ship, will not lie, for injury to a beast a writ in trespass vi et armis lies. Judgment affirmed.

There can be trespass on chattels where there is asportation, or an exercise of authority over them to the exclusion of the owner.

Clerk and Lindsell (184) and Pollock both think that unpermitted contact with a chattel, without injury or asportation, may sometimes be allowed to maintain an action.

WILLAR v. BARKER, p. 50, Mass., 1840.

Trespass de bonis asportatis, brought against sheriff because one of his deputies converted some shrubs and plants of Plff. to his own use. Verdict for Plff. in lower court; HELD, that if a party exercise authority over goods against the will, and to the exclusion of the owner by an unlawful intermeddling, it is sufficient to maintain trespass, even if there be no forcible taking. Such an act is illegal attachment of property by sheriff.

Here the owner was dispossessed without manual touching, taking or removal. This is the point of the case that neither removal nor touching is necessary to maintain trespass. Dispossession is enough.

"He who interferes with my goods, and without delivery by me, and without my consent, undertakes to dispose of them as having the property, general or special, does it at his peril to answer to me the value in trespass or in trover." p. 50.

COLE v. FISHER, p. 52, Mass., 1811. (omit 197-99.)

Trespass vi et armis. Deft. after cleaning a gun went to door of shop, one rod from street and fired it for the purpose of drying it. Plff's horse, in chaise, was fastened to fence across street. Frightened he broke away, ran, and smashed the chaise. HELD, that it was a question of some difficulty whether trespass or trespass on the case lies in this matter, whether it was immediate or consequential injury. Intention of Deft. is immaterial. Liability in this form of action depends on whether horse was in plain sight, or Deft. had noticed it, and distance was such there might be reasonable apprehension of frightening horse. If so, injury is immediate and Deft. liable in this action.

BAUCH v. CARTER, p. 55, New Jersey, 1867.

Trespass. Plff's horse was tied in the highway. Deft. untied it and fastened it to another post ten yards away whereby an accident happened which resulted in death of horse. HELD, that this was a trespass. The Plff's horse was fastened to a post in the highway to which Plff. had as good a right as anybody, and Deft. had no right to move it.

In actions of tort, the Plff. may recover, even though he do not prove the entire cause of action as laid in the declaration, if the averments are of such a kind that they may be divided.

Here there was an asportation, for which the law will afford damages even if no actual injury is proved.

Section 8, Excusable Trespasses.

WEAVER v. ACKLAND, p. 58, King's Bench, 1819.

Trespass, assault and battery. Deft. pleaded that he and Plff. were soldiers. That their company was skirmishing with another, their muskets being loaded with powder, and while they were so doing, Deft. in discharging his piece, accidentally wounded Plff. Plff. demurred. HELD, that though felony must be done animo felonico, it is not so with trespass. No man shall be excused of a trespass unless it be done utterly without his fault, as if Plff. ran across piece when it was discharging. Judgment for Plff.

This case certainly decides that Deft's plea was insufficient. It is not sufficient to excuse a prima facie trespass, to plead that there was no intention to harm.

There are two theories as to the making of the plea sufficient; one, that Deft. should have denied negligence, the other that Deft. should have pleaded that the injury was inevitable so far as Deft. was concerned. but Prof. Smith thinks it profitless to try to discover what was the early limitation of a trespass. Also there is a theory that this case turns on a question of pleading.

The case is often quoted but decides nothing of importance.

DICKINSON v. WATSON, p. 57, King's Bench, 1820.

Assault, battery and wounding by discharge of gun. Deft. pleaded that it was an accident, that while he was discharging gun Plff. crossed his way. Plff. demurred. HELD, that in trespass Deft. shall not be excused without unavoidable necessity, which is not shown here.

Here the court says, it is not enough to plead "I took ordinary care." One must say, "I took the greatest possible care, yet the accident was inevitable."

The plea should have stated this specially.

NOTE to Weaver v. Ward.

Intention to harm is not necessary for trespass. The Deft. should have denied that he was negligent, or as one says, he should have alleged the harm as inevitable. Previously to their case, there was no definition of a tort under such circumstances. The truth is, about all the cases of this period were decided on points of pleading.

JAMES v. CAMPBELL, p. 68, Nisi Prius, 1840.

Assault and battery. Deft. fighting with a third party, struck Plff. HELD, that if deft. struck Plff. he is guilty of assault and battery, whether it was done intentionally or not. Intention is material only in considering amount of damage.

Plff. might be held here on ground that act was unlawful that he was engaged in. Three cases of battery. 1st, intended; 2nd, negligent, 3rd, where the act the man was doing was itself unlawful.

Here the accident would not have happened if Deft. had not been doing an unlawful act. Cooley Star p. 184. Pollock 180, 2d Ed. 2.

Carefulness is not a defense, if the act Deft. is doing is unlawful.

In this case Deft. was held for negligence, but could have been held on the ground that the whole act was unlawful.

STANLEY v. POWELL, p. 58, Queen's Bench Division, 1890.

Plff. and Deft. were in a shooting party. Latter fired at a bird, a shot glanced from a tree and wounded Plff. Jury found no negligence. HELD, that in order to constitute a defense in case of trespass, it is not necessary to show that the act was inevitable. It is merely necessary to show that Deft. was entirely without negligence. Judgment for Deft.

Accidental injury neither negligent nor wilful is not an actionable trespass.

The jury found that there was no negligence on the part of the Deft.

It is an open question in the United States as to whether the use of firearms is extra hazardous.

This is a good case for reviewing the old authorities.

Bullock v. Babcock, p. 64, New York, 1[illegible].

Trespass, assault and battery. Parties were small boys. One had a bow and arrow, said to Plff., "I will shoot you." Latter hid behind something. Plff. shot at a basket, Deft. raised his head at that moment and was badly wounded. HELD, that Deft. was liable, injury not resulting from unavoidable accident, even though Deft. was very young. An infant is liable for torts.

BROWN v. KENDALL, p. 67, Mass., 1850.

Trespass, assault and battery. Two dogs, belonging to Plff. and Deft. were fighting in the presence of their masters. Deft. took a stick and beat the dogs to separate them. Dogs moved toward Plff., Deft. keeping on beating them with his back toward Plff., finally in lifting his stick, hit Plff. in the eye. HELD, that if Deft. in doing a lawful act, unintentionally wounded Plff., then Plff. must prove want of due care, in order to recover.

Most important of all these cases. See Walker's Am. Law Sec. 209; 2 New Hampshire 885. This case is now regarded as law everywhere. The judge's charge, final rulings, etc., should be learned. The act of striking with the stick was intentional, but the act of hitting the Plff. in the eye was not intentional, it was an accident. The parting of the dogs was a lawful act and in the case of a lawful act a man is liable only for ordinary care, that is, due care considering the circumstances and surroundings.

EASELY v. CLARKSON, p. 72, King's Bench, 1861.

Trespass for breaking close and cutting grass and carrying it away. Deft. pleads that he was mowing his own adjacent land and involuntarily and by mistake cut some grass on land of Plff. Plff. demurred. HELD, that Deft. is liable. For act was voluntary and intention and knowledge cannot be considered for they cannot be known.

At that time a tender was of no avail as a defence; it is of avail now. The case was decided as though no tender had been made. Only de-

fence here was that of a mistake of title in land which could not avail Deft. A non-negligent mistake as to the title of the property is no defence to an action of tort. Applies to tangible property. Law goes further to protect real than personal property.

The physical act of entry was voluntary. Cutting Plff's grass was a mistake. Question is, was there negligence. Intent can be judged only by action. "Intention not traversable" does not hold today. Questions of intent are tried every day. Case comes to this: Mistake as to ownership of property will not excuse trespass on the property. Holmes, 155, 97-98, gives reason for this.

HIGGINSON v. YORK, p. 72, Mass. 1902.

Trespass for breaking and entering close of Deft. and carrying away wood. Deft. master of a vessel, was employed by one Kenniston to take a cargo of wood from a certain island. Deft. took the wood, sold it, and paid K. K. had bought the wood from one Phinney, and Deft. was ignorant of the fact that latter had cut it without any right, on land belonging to Plff. HELD, that Deft. was clearly a trespasser in going, without right, on land of Plff. His mistake was no answer to Plff., no reason why they should lose their chattels. He is clearly answerable as a trespasser, for the value of the wood.

Adds to Basely v. Clarkson, "Deft. is liable, even though he receives no benefit, and even if there are two wrong doers before him."

Deft. did not get the benefit nor was he the wrong doer primarily. These are the two distinctions between this case and Basely v. Clarkson. The principal cannot confer any more right on his agent than he has himself. The agent might have an action here against his principal.

Supposed cases - four carriages badly damaged.

Accident. (1) struck by lightning. (2) collision with another not preventable by ordinary care on the part of either. (3) collision not intended, but could have been prevented by ordinary care on part of other driver. (4) carriage run into by another racing illegally on the highway, but driving with reasonable care.

CASE 1. No human liability; 2. Done by human being and no human liability, being unavoidable; 3, was unintentional, but not using due care; was liable for act. That it was unintentional is no defence, if it could have been prevented by the use of due care; 4. In this case, was not negligent, but act was illegal in itself. 89 Conn. 85. (1st) All acts which are inevitable or unavoidable because brought about by the operation of nature alone. (2) Those resulting wholly from human agency, but which were unavoidable under the circumstances, by the exercise of the care required for such. (3) Those resulting wholly or in part from human acts, but which were unavoidable by using the degree of care, required by law, in the performance of an act lawful in itself. (4) Those that could be avoided by refraining from attempting to perform an act unlawful in itself, even if performed with care.

An act that was unintentional, and without negligence, and despite due care, will ordinarily excuse a trespass. Some authorities require

extraordinary care in some few cases.

STEPHEN'S Digest of Criminal Law, Art. 210. "An effect is said to be accidental when the act by which it is caused is lawful per se and is not done with intention of causing it and when its occurrence as a consequence of such acts is not so probable that a person of ordinary prudence ought under the circumstances in which it is done, to take reasonable precautions against it."

Holmes, The Common Law, p. 94, says, "The general principle of our law is that loss from accident must lie where it falls, and it is not affected when a human being is the innocent agent of misfortune, but relatively to a given human being anything is accident which he could not fairly have been expected to contemplate as possible (probable) and therefore to avoid.

In old times, it was enough that the act happened (see Smith on Torts p. 257). The law regarded not so much the intent as the damage done. The rule was stated thus, he that is damaged ought to be recompensed. Holmes Common Law p. 98, says of this rule that it would be more sensible to amend the Constitution so that the whole state should pay the damage than to have one innocent Deft. pay it. If both parties are innocent, there is no reason why the hardship should be transferred from one innocent party to another equally innocent.

SECTION VI. (continued).

(b) Leave and License. Latter v. Braddel, Wife, and Another, p.77, Common Pleas, 1880.

Action for assault. Judge withdrew case from jury as regards the Braddels, on the ground of no evidence of non-consent of Plff. Plff. was servant of Deft. Latter arrived home after an absence and was informed that Plff. was in a family way. Plff. denied it. Doctor was summoned, and at mistress' orders (without any threats) Plff. submitted though with some protest, to examination by doctor, who decided she was not in a family way. Verdict for Deft., the Doctor. Rule obtained calling on Deft. to show cause why verdict should not be set aside and new trial ordered, on ground of wrongful withdrawal of case from the jury by the judge. HELD, that Plff. was properly non-suited. No force, or threats of force were used, nor was Plff. put in fear. She cannot plead non-consent, because it was perfectly in her power not to obey, and though it may have been against her will, she nevertheless in effect gave her mistress leave to have her examined. Rule discharged.

Of course the general rule is that consent is a defence, but there are exceptions. In common speech the girl did not consent. She probably yielded in fear of discharge, also she probably thought the people had a legal right to examine her. But this does not vitiate her actual consent. So long as she did not submit because of violence or from reasonable fear of violence, her consent was valid and excused the assault.

Consent procured by force or intimidation would not be consent at all.

HAGARTY v. SHINE, p. 80, Ireland, 1872.

Action by female Plff. against male Deft. for assaulting her and infecting her with venereal disease. It appeared from evidence that illic-

it intercourse had gone on between Plff. and Deft. for two years, during which time Plff. contracted the disease from Deft. Judge charged jury that fraud of Deft. in concealing his condition vitiated consent of Plff. Verdict for Plff. In upper court is HELD, that judge's charge was erroneous. Deceit by one of the parties cannot transform a long permitted relation into assault on his part. Further, in order to maintain action for fraud, duty to disclose must be shown. In connection with an immoral act no such duty can be shown. Courts do not provide remedies for consequences of immoral acts.

General rule is that fraud vitiates consent. Why not here? Because it is consent to an immoral act.

L.R., 2 Q.B. 410, case of physician deluding a young girl.

A duty of disclosure does not arise out of an agreement to do an illegal act. Hence a person is not bound to reveal his condition as to disease. 8 Carrington and Payne.

HAMILTON v. LOWAY, p. 88, New York, 1858.

Action for seduction. Motion by Deft. to be discharged from arrest. Ground on which Plff. claimed to sustain the arrest was for the seduction, alleging that she had been defrauded by false promise of marriage on part of Deft. HELD, that a promise to do something in the future is never sufficient to maintain an action of deceit. Further, as the person seduced assents, she can never maintain an action for the seduction. Action must be brought by a third party who has been deprived of her services. Judgment for Deft.

Plff. could not bring breach of promise as Deft. was under 21 years; were he over 21, court would consider seduction in aggravation of breach of promise, but will not allow action for seduction. The person entitled to her service, could bring action for loss of her service.

omit FITZGERALD v. CAVIN, p. 8?, Mass., 187?.

Assault. Plff. testified that Deft. seized him by the testicles and squeezed them severely. Deft. testified that it was done, without any malice or anger, while they were fooling with each other. Judge charged that Deft. would not be liable if there was no malice or intent, and if parties were playing together lawfully by mutual consent, and if the act done was no other than Deft. might have expected; that whether or not the force used was reasonable is to be determined, not from results, but from force used at the time and the nature of the act; that if Deft. intended to do the act and that act was unlawful and unjustifiable and caused bodily harm, then Plff. could recover. Verdict for Plff. Exceptions. HELD, that the rulings were sufficiently favorable to Deft.

(148 Mass. 378). Consent means outwardly manifested consent, not secret hope to get damage. When will litoral consent not be sufficient? When caused by force or fear of violence. Fear must be reasonable and of immediate force which it would be foolish to resist. Fraud, illegality, etc., are considered in these cases.

Plff. need not have consented to the specific thing, as to the injury

happening in a foot ball game; but his consent implied from entering the game, is a valid defence to all acts not done maliciously or unfairly in violation of the rules.

omit

WHITMAN v. STANGLL, p. 85, New Jersey, 1892.

Deft. removed reins from Plff's horse which was tied in the street, so that Plff.'s clerk could not drive horse home. Deft. refused to give them up when so requested. Deft. claimed he did it as a joke, and upon his giving up the reins the judge dismissed the case. Error assigned. HELD, that it was a question for the jury whether from past relations between the parties deft. had a right to believe that plff. would take it as a joke. Judge had no right to decide this. Maxim, "De minimis non curat lex" does not apply, for trespass on property is actionable however small the damage. Judgment reversed.

There is great doubt as to how far a practical joke can be defended on ground of past relations between the parties.

omit

THE STATE v. BECK and OTHERS, p. 88, No.Carolina, 1892.

Indictment for assault and battery. A person who had lost leather got Beck and others to aid him in the search. They found the leather on the premises of one Anderson, whom they immediately took into custody. Some one asked him if he would not rather be whipped than go to jail. He said he would, and requested Beck to whip him. Beck hesitated, but at earnest request of Anderson, finally hit latter a few blows with a switch. He was found guilty in lower court and moved for a new trial. HELD, that where there is no intent to injure and no negligence, battery cannot be imputed. Act was done at earnest request of Anderson and against will of deft. New trial granted.

The decision can be defended if at all, only on the slight degree of the offence. Had the deft. killed Anderson at request, deft. would have been liable for murder, just as if no consent were obtained.

Absence of lawful consent is an element to an assault and battery. Consent must be manifested, not simply taken for granted.

143 Mass. 572.

There is no effectual consent if plff's will is overcome by force, fear of violence, or reasonable apprehension of force which it would be dangerous and useless to resist.

In a game, person consents to take chances of injury if done fairly and in accordance with the rules of the game. If the game is a simple kicking match, there can be no consent, as that is unlawful, and there is almost a certainty of serious bodily harm. In football, injury is not a necessary nor presumable result.

A game is illegal (1) if it is carried on in anger, (2) if, though not carried on in anger, yet there is intent to do appreciable bodily harm; (3) if, though no anger and no special intent to harm exists, yet from the nature of the contest there is a probability that appreciable bodily harm will frequently result.

Voluntary consent will excuse trespass when the trespasser shows no hostility, malice, or when act is not per se unlawful; then each party

loses his defence.

128 Mass. 185 (An analogous case) is not perfectly satisfactory.

BELL v. HANSLEY, p. 88, No. Carolina, 1855.

Trespass, assault and battery. Evidence showed a mutual affray and fighting by consent. HELD, that as the fighting itself was unlawful, consent of parties is no bar to an action. Either can maintain an action for assault and battery. Judgment for plff.

Bell v. Hansley is distinguishable from Hamilton v. Lomax where consent barred the action. In Bell v. Hansley the fight would endanger life and was a breach of the peace. Also seduction was a private wrong and did not generally work bodily injury. Fighting is more public than seduction; this has had has great weight. Also, fighting was in early times a common law crime but adultery was not, being only an ecclesiastical offence, unless open and notorious.

Bishop, Non-Contract Law Sec. 198, thinks this decision wrong, and that a civil action should not be allowed. The weight of authority however is with Bell v. Hansley.

Consent may be inferred by overt act, as well as by parol. Tacit consent. See 149 Mass. 578. Consent must be manifest. Fraud vitiates consent. Force vitiates consent. In games, a man consents to taking ordinary risks and chances of the game, played as a sport according to rules of the game. In an illegal game this consent is vitiated. Pollock on Torts 2nd Ed. 145. Boxing, with properly padded gloves is lawful; with fists, unlawful. First is lawful because no danger is likely to follow. Question is, when are the gloves properly padded?

Section 91, Excusable Trespasses.

(c) Defence of Self and Closely Allied Persons, p. 89.

OSBORN v. CLAYCOMB, Ills., 1869.

Action for assault and battery. Plff. had advanced upon deft. in a threatening manner for the purpose of fighting, and deft. had beat him. Judge charged that if plff. started it, he could not recover, even though deft. had far exceeded mere self-defence in the beating he gave plff., provided he desisted so soon as plff. asked him to; also that plff. in order to recover should have given no provocation. Verdict for deft. Appeal. HELD, that these charges were wrong. As to first, no more violence can be used than a reasonable man would under the circumstances regard necessary for his defence. As to second, no matter what plff. did by way of provocation, if deft. went the least bit beyond self-defence he was guilty of battery. Judgment reversed.

The question as to when a man may take the life of another is left to the course on criminal law. Self-defence is treated there more fully. We shall consider here only part of the subject.

As to defence of self, in cases where killing is not allowed:

1st. Force is allowed only in face of apparent overwhelming danger.

2nd. Actual danger not necessary, reasonable apprehension enough.

3rd. Mere apprehension not enough, must be reasonable.

4th. The assailed person is not under obligation to retreat before resorting to reasonable means of self-defence, short of such means as

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might probably endanger life.

Provoking words may be a defence in a criminal action, but are not in a civil action. They may reduce damages. 2 Sedgwick on Damages, Sec. 427. But this is the best rule, viz., they should only reduce punitive damages, not compensatory damages.

Person is not bound to stand on a passive defence; may make an actual use of force. He cannot take law into his own hands and punish attacking party.

COLE v. PERKINS, p. 102, New Hampshire, 1857.

Trespass for assault and battery. Deft. pleaded that though he did assault plff., latter used excessive force in defending himself. Question was, could plff's cause of action be lost through subsequent wrongs committed by himself. HELD, that it could not. Plff. had right to use a necessary amount of force in self-defence. But for whatever he used in excess of that, he was liable. For this he was guilty of assault, but plff's original assault cannot be set off against this. Each party may maintain an action for the injury received. Judgment for plff.

Singular conflict of authority. Illiott v. Brown is exactly opposite. A. was small man, B. large and powerful. A. struck B., B. threw him down twice, pounded him unmercifully. A. sued B. Court held that man using excessive force against attacks, thereby loses right of action against original wrong doer.

Law does not allow set off in torts. Many courts would however allow set off of judgment. Bishop, Non-Contract Law Sec. 600 thinks in a case of assault upon each other, they both ought to be turned out of court

Prof. Smith thinks both parties have a cause of action.

KICK v. PALSTEAD, p. 105, King's Bench, 1899.

Trespass for killing mastiff. Deft. pleaded that it was a savage dog, addicted to biting; that it came into his yard, so that he was afraid to go out, of which plff. had notice. Plff. refused, at deft's request, to keep the dog away. Consequently deft. shot the dog. HELD, that the plea was good. Judgment for deft.

Had dog been on highway, deft. could not have shot him, but dog came into his yard and plff. had notice. A man has the right to go out in his yard. Plff. was reasonably afraid, and justified in shooting the dog.

MORRIS v. AUGENT, p. 105, Nisi Prius, 1828.

Trespass for shooting plff's dog. The dog was of a mischievous disposition and had bitten others. As deft. was passing plff's house, the dog ran out and bit deft's gaiter, and then ran away, and as he was running deft. shot him. HELD, that, to justify shooting a dog the animal must be actually attacking the party at the time. It made no difference that he was ferocious and at large. Verdict for plff. The trouble in this case variance. The deft. set up one plea and proved another state of affairs. The court held however that deft. must stick to the language of his plea. On general grounds perhaps he would have been excusa-

ole. In 55 N.H. 412-414 the court said deft. had a right in Morris v. Nugent to do what was reasonably necessary, and it was a question for the jury whether deft. in the excitement and confusion, had such reasonable apprehension as to justify his shot.

OHLEIN v. Cromack 109 Mass. 275. HELD, although the dog in that case was dangerous and accustomed to bite those who came near it, yet as it was confined so that persons properly on the premises were in no danger from it, and deft. had not been attacked by it, he was not justified in shooting it.

D. Defense

D: Defence of Property, Anonymous, King's Bench, 1470. p. 110.

Trespass. Defence, attempt to rob. HELD, a man may use force upon another to prevent his stealing from him.

A man may use force to protect his property.

GREEN v. GODDARD, p. 110, Queen's Bench, 1708-1705.

Trespass, assault and battery. Deft. pleaded that a bull broke into his close and as he was driving him out, plff. came into the close and tried to drive him back, when deft. by force ejected plff. Plff. demurred, arguing that he should have been asked to leave. HELD, that in case of forcible trespass, as burglary or breaking down gate, injured party may oppose force with force, but if a man merely enters one's close, that will not justify an assault without first a request to leave.

If a trespasser enters quietly, you must order him off before force can be used, but otherwise if he enters forcibly, as a burglar, then you may use force to eject, and any amount of force that is necessary.

COLLINS v. BENISON, p. 111, King's Bench, 1734.

Trespass for overturning a ladder and throwing plff. to the ground. Deft. pleaded that plff. against his will put up a ladder in deft's garden, and in spite of deft's forbidding him, climbed up and started to nail a board to the house; whereupon deft. overturned the ladder, doing plff. as little damage as possible. Demurrer. HELD, that such force is not justifiable in defence of the possession of land. Overturning of the ladder could not answer purpose of removing plff. from the garden.

Probably there is no right to imperil life and limb to remove a trespasser.

TULLEY v. REED, p. 112, Nisi Prius, 1828.

Action for assault and battery. Deft. pleaded general issue, and special plea of molliter manus imposuit. HELD, that if a person enters another's house forcibly, force (but no more than is necessary) may be used in turning him out, without a previous request to depart. But if the person enters quietly, force may not be used without a previous request.

COMMONWEALTH v. CLARK, p. 112 Mass. 1840.

Assault and battery. Deft. entered one Briggs' close. Refused to go when repeatedly told to do so. Then Briggs used some force, exactly what was not certain. Court instructed jury that Briggs, after request to leave and refusal, had right to use proper force; if jury thought he

used too much or inappropriate force, then he was guilty of first assault, otherwise not. Verdict for plff. Deft. alleged exceptions to court's instructions. HELD, that the court's instructions were correct. There were two questions for jury to answer: 1st, did Briggs have good reason for using force, 2nd, was the force he used appropriate in kind and suitable in degree to accomplish the purpose. Judgment on the verdict.

The defence was that Briggs used unjustifiable force, and deft. was justified in returning force. But court said that because force would constitute a battery, it was no reason why it could not be justified. Questions were whether force was justifiable, and whether it was appropriate.

To repel entrance on land or to defend property, a moderate amount of force is allowed. If the entry is peaceable, force can only be used after request to depart. Owner must try to push the trespasser off before striking; there is but little definite authority to allow a man to use force except in defence of person and property. Clerk & Lindsell on Torts, p. 107.

WADHURST v. DAMMY, p. 114, King's Bench, 1804.

Trespass for killing a dog. Deft. pleaded that he was warrener of a certain warren, and used to find the dog killing conies there, wherefore he killed him. Demurrer. HELD, that to save the conies was good cause for killing the dog. The common custom in England of killing dogs and cats found in warrens is so well established as to be lawful.

You cannot always sue the owner unless he knew of the evil qualities of the animal, but if attacked, you may always kill the animal.

Plff. had a right to keep conies. Here the decision is put on the ground of the common use of England. Today it would be put on the ground of reasonable necessity.

JANSON v. BROWN, p. 115, Nisi Prius, 1807.

Trespass for shooting plff's dog. Deft. justified his act on the ground that the dog was worrying and attempting to kill a fowl of deft's and could not otherwise be prevented from so doing. It appeared that dog had just dropped the fowl from his mouth when the gun was fired. HELD, that this was not a justification, for in order to excuse the shooting, the dog must have been in the very act of killing the fowl, and not to be prevented by any other means. Verdict for plff.

The case can only be defended on the ground that the court held the deft. to prove his plea very strictly; court was too strict in their requirement. The case is criticized in 54 N.H., 410-411.

54 N.H. 411, Aldrich v. Wright, referring to Janson v. Brown, says, "The dog might have been lawfully killed when he had the fowl in his mouth and the fowl being wholly or partly in his mouth, or an inch, a foot, a rod, or 20 rods distant, is all a matter of degree and of fact for the consideration of the jury, on the question of the danger and the reasonable means of protecting the fowl."

LEONARD v. WILKINS, p. 115, New York, 1819.

Trespass for shooting plff's dog. The dog was in a field of deft.

running with a fowl in his mouth. Deft. called after him, then fired. HELD, that as the dog was on land of deft. in the act of destroying a fowl, deft. was justified in killing him. The only question in these cases is whether the killing was justified by the necessity of the case.

You may shoot a dog that is attacking yourself or your property, but you cannot sue the owner unless he knew of the dog's vicious quality. You must not shoot the animal if he is retreating.

CLARK v. KELLIHER, p. 113, Mass. 1871.

Plff. suffered his hens to go at large. Deft. occupied adjoining lot, and hens got on his land. Deft. requested plff. to shut them up, said he would kill them if they were not kept off. Plff. refused, whereupon deft. killed them all. HELD, that this act was not justifiable. Deft. should have contented himself with legal remedy of a suit at law. Destruction of valuable property not necessary to the protection of his rights. Notice of intention makes no difference. Judgment for plff.

The court did not give sufficient attention to the fact that killing might be justifiable, if there was no other way of keeping them out, and that the necessity for killing hens would be greater than in the case of more valuable animals which could be impounded, or fenced out.

LIVERMORE v. BATCHELDER, p. 117, Mass. 1888.

Tort for killing plff's dog. Plff's dog was on deft's premises and killed hens. The dog was driven away, soon returned and ran toward henhouse, when deft. having reasonable cause to believe that the dog was going to kill other hens, shot him. HELD, that there was no justification in that. Deft. must also have had reasonable cause to believe that it was necessary to kill the dog in order to prevent him from killing the hens, in order to justify the shooting. Judgment for plff.

There was not reasonable ground for believing that there was no other way of preventing the dog from doing the damage.

The decision is correct on these facts, but if the dog made frequent incursions, deft. would be justified in killing him.

ALDRICH v. WRIGHT, p. 118, New Hampshire, 1878.

Deft. in order to recover the penalties prescribed by statute for killing minks. Deft. pleaded that the animals at the time were pursuing his geese. The minks were swimming after the geese and were from one to three rods away when something frightened them and they crawled out on an island. Just then deft. appeared and shot them. Verdict for plff. subject to deft's exception to ruling that he would not be justified if the geese were not in imminent danger and could have been protected by driving away geese or frightening away minks. HELD, that if all things considered, deft's shot was reasonably necessary to prevent mischief, he was justified. He could not be compelled to drive the geese away if he wished to keep them there, and if killing minks was reasonably necessary for his business of geese raising, he was justified.

The decision of the court is much longer in the original report than here, and is very valuable for it criticizes many cases of this sort. Charge of the lower judge is well criticized in this decision. It required too great actual danger, whereas the court said apparent danger

was sufficient.

In cases of shooting, one must regard both the consequences of shooting and of not shooting,- the expenses of other means of protection as well as the one in question.

This case holds that in determining what is reasonably necessary in defence, considerations of economy must be taken into account.

DAVIS v. CAMPBELL, p. 191, Vermont, 1851.

Trespass for injury to plff's cow by means of a dog. Plff's cow, running at large in the highway, entered deft's enclosure and did damage. Deft. caused cow to be driven away by dog, and dog bit her severely. HELD, as facts show that the dog to have been such a one as a man of ordinary prudence would have used in driving his own cows, and deft. to have used due care in setting him on the cow, he cannot be held liable.

It is not necessarily unlawful to set dog on animal to drive it away, as this case shows. It is all right when a reasonable farmer would do the same to his own property.

DICEY on the Constitution, 4th ed. App. Note 4 speaking of the right to use force in defence of property says, "The right is confessedly indefinite;" and that it must be a compromise between two suppositions, viz., that one may use unlimited force in defence of property, and that one may not use any force in defence of property.

Dicey's remarks on self-defence are the best ever written.

It is a common belief that a man can use all necessary force in defence of property. This is not true, for one may not inflict upon the wrongdoer harm out of proportion to the right to be protected, even if in defence of property or personal liberty.

SECTION VI. (continued.)

(e) Recovery of Property.

ANNONYMOUS King's Bench, 1506. p. 199.

Trespass for assault and battery and beasts taken. Deft. says he possessed a horse and plff. took it out of his possession. Deft. asked him for it, plff. refused to give it up. Deft. threatened to take it if he would not give it up, then went toward plff. with a staff, which is assault complained of. HELD, justifiable assault.

Where there is a right to use force to retake personal property.

There is a right to use a reasonable amount of force to protect property in your possession as well as your person. There is also a right to use force for immediate recaption to some extent as to defend your possession. Beale's Cr. Cases, 859, O.v.Donohue. Where attempt to recapture is made after the lapse of time, there is a conflict of authority. Blades v. Higgs settles for England that there is such a right, even to take from the bona fide purchaser from a thief; the R.I. case p. 188, draws the line at bona fides.

Whole law of self-defence is a compromise: Dicey on the Constitution, App. Note 4. Prof. Smith suggests; Forcible recapture is not allowed except, either, 1. When possessor does not hold under a bona fide claim of right, (Kirby v. Foster,) or (2), When there is reasonable ground to believe that owner will not be able by legal proceedings to recover the chat

tel or to obtain pecuniary satisfaction, and possibly, (3) when possession must be had at once or not at all, in order to be beneficial, as ticket to a theatre.

In the anonymous case it is not clear whether it was an immediate reception or not. The use of staff might raise a question today as to whether force used was reasonable or excessive.

BLADES v. HIGGS, p. 129, Common Pleas, 1861.

Trespass. Declaration alleged assault and taking from pltf. his goods, dead rabbits. Deft. pleaded that pltf. took the goods wrongfully from deft's master and deft. took them back, using no more force than was necessary. Demurrer. HELD, that plea is good. In defending actual possession deft. certainly would be justified in using force. No substantial difference between that case and this. Wrongful detention same violation of right of property as wrongful taking. Argument as to breach of peace has been overruled in case of forcible expulsion of trespasser from land. Same applies to chattel. Remedy by law would often be worse than the mischief, when law would aggravate, instead of redressing.

The case arose on a demurrer. The rabbits were purchased by pltf. from poachers who had killed them on the Marquis's land. There is no allegation, whether the holding was in good orbad faith. The court said no allegation was necessary, as to good or bad faith. Also says deft. was practically in possession, as much as if the rabbits had been taken from his hands, because after demand, and refusal, possession was in law in the Marquis. The reasoning is purely artificial, and is not to be in any way sanctioned.

The case stands for the point that the owner of goods which are wrongfully in the possession of another may justify an assault involving no unnecessary violence in order to repossess himself of his property.

BOBB v. BOSWORTHAC. 181, Kentucky, 1808.

Assault and battery. Deft. was in possession of a slave which was subject to dispute between the parties. Pltf. came and assaulted deft. to get slave away. HELD, that no matter which party had better right to slave, one could not use violence in taking it from the other. Forcible defence of possession is allowed, and peaceable recaption, but not forcible recaption. Judgment for pltf.

The case was one of forcible recaption taking place some time after the taking. It was held to be wrong, as the law regards the preservation of the public peace of more importance than the right of any person to maintain possession of his own property.

KIRBY v. FOSTER and ANOTHER, p. 188, Rhode Island, 1891.

Pltf. was in deft's employ. Latter gave him money to pay help. He deducted from it a sum which he claimed was owing him, put it in his pocket and was about to leave when deft. seized him. A struggle ensued in which pltf. claims to have received injury. Verdict for pltf. Exceptions. HELD, that a man can undoubtedly protect himself from larceny by force. But his right of defence and recapture involves two things: (1) Possession by owner; (2) wrongful taking without a claim of right.

If possession has once passed peaceably, law does not allow forcible recaption. Legal remedy may be inadequate, but still the injured party cannot be arbiter of his own claim. Law gives right of defence, but not or redress. Exceptions overruled.

If this was a case of immediate recaption (Smith thinks it is not) the view as to bona fide taking by plff. would not be generally followed, but probably it is a case where plff. had been in possession for a reasonable time. The court distinguishes between a purely wrongful taking without claim of right, and a technical wrongdoer, as here.

9 Harv. Law Rev. 28, contains statement by Prof. Ames as to the old law on recaption.

Forcible recaption is allowable in England in all cases except possibly that of bailee detaining goods beyond time. Not allowed in America except in wrongful taking from immediate possession of owner.

The arguments in favor of immediate recaption are (1), the taker may be pecuniarily irresponsible and the article spirited away so that it cannot be replevined. (2), the article may be perishable and so useless unless recovered immediately. (3), Legal remedies are more or less dilatory.

The arguments against forcible recaption are (1), it tends to a breach of the peace; it makes the recaptor the judge and enforcing officer of his own case. (2), there is danger of the use of excessive force. (3), The argument drawn from the dilatoriness of the law is really a reason for improving the law rather than for casting it aside.

SCOBE v. BOSWORTH held that forcible recaption is not allowable in any case and this is the general rule in the United States. But the cases allow the following exceptions to this rule in a good many jurisdictions: (1) Forcible recaption is allowed in case of a mere wrongdoer, with no bona fide claim to possession. (2) When it is probable that no adequate satisfaction can be recovered by a resort to law. (3) When possession must be had at once or not at all to be of any value.

NEWTON v. HASLAND, p. 188, Common Pleas, 1840.

Trespass for assault and battery by deft. on plff's wife. Plff. had hired a house of deft. for six months. The day after the time expired, rent not being paid, deft. distrained goods of plff. Picked locks of doors. Mrs. N. refusing to leave on request, he put her out forcibly. Question was, whether after end of tenancy and notice to quit, landlord may enter and turn tenant out forcibly. HELD, that unless deft. was in lawful possession, he was not justified in expelling Mrs. N. by force. He was not in lawful possession because he entered by force. Therefore he was not justified in expelling forcibly a tenant, who, having lawfully come into possession, merely continued to hold after expiration of time. Forcible ejection alone would make original entry a forcible entry and hence illegal. Coltman, judge, dissented holding that deft. by entry obtained a lawful possession and was justified in turning out plff's wife as an ordinary trespasser.

Substance of Statute of forcible entry: No owner shall make forcible entry on his own land, while in the possession of a wrongful holder.

If he does he shall be punished by fine or imprisonment, and the court will also order possession restored to the wrongful holder, who was thus so forcibly ejected.

Judgment was for plff. 3 to 1, but judges really stood 3 to 5, as Parke & Alderson B.B. decided for deft. when the case was tried before them. The case is not law in England today.

There is no doubt of an owner's rights to take forcible possession of his real property at once, if the trespasser's possession is only momentary. In both cases of retaking one is liable for excessive force.

14 Amer. Law. Review, 429, says that where the statute prevails there are three views; (1) Tenant may maintain trespass quare clausum fregit and maintain assault as aggravation; (2) Tenant cannot maintain trespass quare clausum fregit, but can maintain an action for assault. Newton v. Harland. (3) Tenant can maintain no civil action whatever against owner. Low v. Elwell and minority. Newton v. Harland.

The second view is not consistent, action for assault ought to fall with quare clausum fregit. Pollock on Torts, 2nd Ed. 329.

LOW v. ELWELL and WIFE, c. 146, Mass., 1876.

Plff's husband occupied a house under an oral lease. That being determined by lease to deft. and notice thereof he refused to leave. Therefore deft. entered and, using no more force than was necessary expelled plff. HELD, that as tenant has no right of possession against landlord after expiration of his lease, latter is not liable in tort for damages for forcible entry, or for assault in expelling tenant, if he uses no more force than is necessary. Landlord may be indicted criminally for the forcible entry, but having right of possession as against tenant, is not liable in tort to latter.

Court here says wrongful holder can bring no civil action. Case differs from Newton v. Harland. These are cases which hold that tenant in these cases can even bring trespass quare clausum fregit. There is undoubtedly a right of immediate forcible retaking of real property. This is not in conflict with Statute of Forcible entry. Retaker is liable of course for excess of force.

The 2nd rule given above under Newton v. Harland is not good; if tenant has no possession, the landlord would have the right to use force in putting him out. See Pollock, 2nd Ed. 328. Either the 1st or the 3rd rule must be chosen.

How does this statute of forcible entry affect the discussion? Statute prescribes a penalty which is exclusive, landlord having paid this penalty, has expiated his wrong. Answer is that the statute forbids as well as punishes. Forcible entry being a crime, ought it not to be a civil wrong also?

This is a very doubtful point, much has been written on both sides. Prof. Smith is inclined to think there should be civil action also. Clerk & Lindsell, 258.

No matter if your state follows the law of Low v. Elwell, or if no forcible entry statute is in force, always advise a landlord not to use force under any consideration, as the jury are sure to go against him.

Statutes prevail everywhere giving a summary process for regaining possession, for summons before a magistrate's court. If a landlord enters peaceably, he cannot be liable for quare clausum fregit. 155 Ill. 177. Having entered peaceably he can do anything to the house that he wishes, but the jury will go against him, so it is usually best to use summary process.

HARVEY v. WAYNE, p. 149, Ireland, 1972.

Action for assault and false imprisonment. Second plea, that pliff. had wrongfully in his possession a certain check of deft's; that he was in their office of his own accord and was about to take check away against their will, when they gently laid hands on him and detained him until he gave it up. Demurrer. HELD, that though Blades v. Higgs justifies an assault in recaption, there is no authority for extending the principle to an imprisonment for an indefinite time. Demurrer allowed.

Even those authorities which hold force allowable in recapture do not allow imprisonment.

BURLING v. READ, p. 152, Queen's Bench, 1850.

Trespass against defts. for breaking and entering pliff's workshop and tearing it down. It appeared that pliff. built the workshop without any right, on land to which defts. as parish officers had title. HELD, that pliff. being a mere trespasser, owners of the soil had a perfect right to pull down the house. A mere stranger never acquires title by intrusion except by Statute of Limitations. Owner can dowhat he likes with the property whether it is occupied or not.

If a man puts up a house without right on your land, you can tear it down.

Very bad policy for landlord to use force. Never advise him to do it, jury will be against him. He should find satisfaction in the summary process statutes of the different states. Suppose landlord entered peaceably, then of course trespass quare clausum fregit cannot be maintained, landlord has right to dismantle house, etc., but jury is likely to give damages to tenant. 115 Ill. 177

ANONYMOUS, p. 153, Common Pleas, 1788.

Trespass quare clausum fregit. Between deft's land and pliff's there was a thorn hedge. Deft. was cutting the thorns, and they ipso invito fall on land of pliff., and deft. entered to take them, which is trespass alleged. HELD, that as falling of thorns on pliff's land was not lawful, so his entering to take them was not lawful. Not enough to show that they fell ipso invito, he must show he could not possibly prevent their falling on the other man's land.

See Holmes Common Law p. 108.

ANTHONY v. HANEY, p. 159. Common Pleas, 1832.

Trespass for breaking and entering pliff's close, tearing down barn, outhouses, etc., and carrying away the materials. Deft. pleaded that he was owner of said barn, etc., and did no unnecessary damage. Demurrer. HELD, that to enter land of another and dig it up as in this case to get one's property is taking the law into one's own hands and cannot be al-

lowed. But even if deft. had not injured land of plff., he must at least show how his goods came there before he can be allowed to enter at will and take them. Law allows entry in certain cases, as where goods were on another's land by accident, but generally does not allow it. Judgment for plff.

In Anthony v. Haney, deft. did not make out that the goods were there by the plff's act, so deft. was liable.

The fact that B's goods are on A's land is no sufficient reason why B should go upon the land and take them. If goods are on A's land and B takes them, B is liable for nominal damages for entry and for actual damages to the land, but not for the value of the chattels. If B's goods are on A's land by fault of A, he may enter, but if by fault of B, B trespasses if he enters A's land to get them. If B's hat is blown on A's land by accident, B can probably go upon the land, but there are two views on this point; (1) That B may enter on condition that he repair the damages; (2) That he is liable anyway in quare clausum fregit. B could probably replevin the hat.

If B's goods are taken by a third person and put on A's land, if A knew that they were feloniously taken, A could enter and take them. If B's goods are taken by one merely committing a trespass and not a crime and A allowed them to be put upon his land, B could probably enter. If goods are put there with the consent of A, but A not knowing they were taken feloniously or tortiously, B could enter; A takes his risk. If B's goods are taken tortiously and put there without A's consent, B could not enter. Higgins v. Andrews, p. 158.

Ames 240-242, note on right of officer to enter, to serve civil processes. If A allows B to keep B's goods on A's land, B could enter, but some of the authorities the other way; mortgage case 105 Mass. 408. If B puts his goods on A's land, A may enter B's land, to carry them back.

PATRICK v. COLERICK, Exchequer, 1838.

Trespass for breaking and entering plff's close and carrying away straw. Plea, that plff. had wrongfully taken the straw from deft's possession and put it upon his close, and that deft. made fresh pursuit and took it away peaceably. HELD, that entry on another's land to take back one's goods is justifiable when the goods came there by act of owner of the land. Judgment for deft.

RIGHT TO USE FORCE TO RECOVER LAND.

If the owner of land makes peaceable entry on his land, he would not be liable for force in repelling force. If he enters fraudently, there is a conflict of authority as to whether he may so use force. It is also doubtful as to whether excessive force makes the landlord a trespasser ab initio.

Forcible entry statutes exist in most of our States. See Am. Decisions 138-140 for an elaborate note on forcible entry. See also 2 Bishop's New Criminal Law 504-512.

To violate the statute of forcible entry there must be more than a mere technical trespass - it does not require physical violence to tenant.

There must be physical force used upon the premises, or threatened against the occupant.

SECTION V1 (continued).

(f) Preservation of Life, Health, or Property of Others,

FLETCHER v. FLETCHER, p. 188, Queen's Bench, 1859.

Declaration for assaulting plff. and giving him into custody lasting a long time. Plea, that plff. acted like a lunatic, that deft. thought he was one, and two physicians had certified that he was one, hence deft. being plff's uncle had caused him to be placed in an asylum. Demurrer. HELD, that by common law only a person of unsound mind, dangerous to himself or others, may be restrained of his liberty by another. But mere fact that person acts like a lunatic is no justification for locking him up, nor fact that one or two physicians say he is a lunatic. Judgment for plff.

If a man is insane and dangerous, any one can imprison him temporarily. If one sees his actions and has reasonable cause for believing he is insane, he can temporarily restrain him, but he becomes liable if the person is confined for a long time. To confine him, he must prove his insanity and follow the statute, if there is one. If there is no statute on the matter, he should have a guardian appointed for him or have him committed by order of the court. In England, the superintendent of an asylum is justified in receiving a person alleged to be insane, if the certificate that he is insane is signed by two physicians. The certificate excuses the superintendent. The person who brings about the committal is protected by statute, if he does it as above. The certificate can be inquired into on habeas corpus proceedings to get him out, and you may go into the question of his condition when he was put in, and at the time of application for release, in such inquiry.

DAVY v. WHITE and OTHERS, p. 165, Nisi Prius, 1827.

Trespass for throwing chimneys on roof of plff's house and damaging the same. Defts. were firemen. House next to plff's was on fire. It stood close to a highway and in order that chimney might not fall on the highway to the great danger of passers-by, deft. had them throw it down, so that it fell on plff's roof. HELD, that deft's act was justifiable. It was their duty and right to remove the chimneys and prevent their remaining to endanger lives of passers-by.

SUROCCO v. GEARY, p. 166, California, 1858.

Action to recover damages for blowing up plff's house and goods during a fire. Deft. as fire officer, claimed he had the right to destroy the building in case of real or apparent necessity. HELD, that right to destroy property to prevent spread of fire is based on necessity. Such property becomes a nuisance which it is lawful to abate. Whenever apparent necessity can be shown, destruction of property is justifiable. Judgment for deft.

The Mayor was justified in blowing up the property if there was apparent reasonable necessity to do so in order to save other property. 2 Indiana 85. That is the doctrine of the common law. Apparent reasonable necessity must be shown by the deft. in his defence. A man may de-

stroy property to avert harm when the harm averted is materially greater than the harm done. Stephens' Digest of the Criminal Law Sec. 32 says the deft. may shw that the evil inflicted by his act was not disproportionate to the evil averted.

Where there is a statute on the subject, the state or city pays as for an appropriation of the property. In such case a private person must prove absolute necessity, while an official is only bound to use care. He is not liable for an error of jugment. Probably where statutes exist on the subject, they do exclude the common law right of the citizen.

If three officers are authorized by statute and only one acts, the city would not be liable; 2 Dillon's Municipal Corporations 4th Ed. Sec. 955-958.

Can I blow up a house when twenty are in danger though I don't own any of them? Yes. 8 Zabriskie (N.J.) 590. The loss might be assessed on those whose property is saved, as in case of ships, but such assessment would be difficult of adjustment.

The constitutional law provides that private property shall not be taken for public use, without just compensation. The courts make a distinction between appropriation (taking) and destruction. 9 Harvard Law Review 203-205.

PROCTOR v. ADAMS and OTHERS, p. 169, Mass., 1873.

Trespass for entering plff's close and taking away boat. Close in question was a beach. Defts. went there between high and low water mark and carried away a boat they found lying there, which had been cast up by the sea. HELD, that if boat was in danger of being lost, defts. had a right to enter and take it for purpose of restoring it to true owner. It is an old rule of common law that an entry on land to save goods in danger of being lost or destroyed is nottrespass.

As a matter of fact, defts. here delivered boat to owner and claimed reward. They were not justified if boat were thrown high and dry.

HOUSE'S CASE, King's Bench, 1608.

Trespass for taking a casket containing money. The casket was on a ferry boat with the owner. A tempest arose and passengers would have been drowned if certain goods had not been cast out to lighten the boat. Deft. threw the casket overboard. HELD, that he had a right to do so. To save lives of men, it is lawful to cast property overboard. If ferryman overloaded the boat, he is responsible, otherwise it is only Act of God and nobody is liable.

This is a case on maritime law. Jettison must begin with the articles least necessary, least valuable and heaviest. By the maritime law the plff. would not lose the entire value of all articles thrown overboard. Those saved would have to contribute their proportional part to make up his loss. If a person without property is saved, he does not have to contribute, as he had nothing in peril. Jettison cannot, except in extreme necessity begin without the captain's orders. 3 Kent's Commentaries Star pages 222 and 223.

KIRK v. GREGORY and WIFE, p. 174, Exchequer, 1876.

Plff's testator died in his own house of delirium tremens, a crowd of feasters and rioters being around. Deft., a relative, put some jewelry in a box and locked it up in a cupboard for safe keeping, as she said. Plff. as executor, went to get them and found they were missing. Hence this action, first court charging conversion, second trespass. Jury found that deft. put the things away bona fide for purpose of preserving them. HELD, that deft. must also prove that the interference was reasonably necessary, in order to justify it. Nominal damages for plff.

To justify interference with another's personal property one must prove, besides good intentions, apparent reasonable necessity to interfere to save the property from damage or destruction.

PUTNAM v. PAYNE, p. 175, New York, 1818.

Deft. brought action in court below against plff. for killing his dog. Deft. knew of ferocious acts of dog. The dog had in addition been bitten a few days before by a mad dog. There was general alarm in the village on account of mad dogs, and the authorities had passed a law authorizing the killing of any dog found at large. HELD, that regardless of this law of the village, common law justifies plff. in killing the dog. It was a dangerous animal, which owner kept in a negligent manner, and which might well be killed as a nuisance. Further, as the dog had been bitten by a mad dog, public safety demanded that he be killed.

SECTION V1. (continued).

(h) Abatement of Nuisances.

JAMES v. HAYWARD, p. 188, King's Bench. (Reported in Croke,Charles, 184.)

Trespass for breaking close and pulling down a gate. Deft. justified on ground that the gate was across the highway and was a nuisance. Plff. answered that the gate was to keep out cattle and the public could not open it without trouble when wishing to pass. HELD, that the erecting of a gate across the highway, though anyone may open it, is a nuisance and as such may be removed by any person. Judgment for deft.

This case would be an authority for allowing uninterested people to abate a public nuisance. For judge decided that every person could remove. Today only those whose rights are invaded can abate a nuisance.

If the party against whom the action is brought created the nuisance, notice is not necessary. But if a third party created it, notice is necessary. In practice, to be safe, notice should always be given. The object of notice is that the owner may abate the nuisance himself and save his property. 70 L.R.n.s.275.

JONES v. WILLIAMS, p. 185, Exchequer, 1848.

Trespass quare clausum fregit. Plea that deft. lived near the close in question, and that plff. injuriously permitted large quantities of filth to remain on the close, from which noxious odors came to deft's house; that deft. entered to abate the nuisance. HELD, that plea is bad, because it does not state how the nuisance came there. If plff. put it there, or, by neglecting some duty, suffered it to remain, the trespass of deft. without notice was excusable. But if the nuisance was placed

there by another person, then notice to plff. was necessary; in order to justify, deft. should have proved that it was one of the first two cases.

Orainarily the person who creates a nuisance is not allowed to complain of the trespass of one who abates, without notice. If plff. creates the nuisance, deft. need not give notice,- this is the general rule. On the other hand, plff. is entitled to notice if he is the alienee only of the original creator of the nuisance. Immediate danger to life will justify omission of notice.

70 L.T.n.s.275; plff. and deft. owned adjoining land. On plff's land was a tree which overhung deft's land. Could deft. cut off branches without giving notice? Court said no. (70 L.T.n.s.712, decision overruled very recently.)

BROWN v. PERKINS and [illegible], p. 187, Mass., 1852.

Action breaking and entering plff's shop and destroying property. Deft. justifies on ground that shop was used for sale of spiritous liquors and that the keeping of them for sale was a nuisance by statute, which he had a right to abate. HELD, that spirituous liquors are not of themselves a common nuisance, but by statute the act of keeping them for sale is a nuisance, and must be abated in the manner prescribed by statute and not by forcible destructio n by a private citizen. An individual may abate a common nuisance when it obstructs his individual rights. Keeping a place for sale of liquors does not obstruct his rights sufficiently to authorize him to destroy the liquor. He must seek the remedy provided by statute.

This is a case of great importance. Look it up in book and read with great care the very able argument of plff's counsel.

A statute creating a right often states the way in which it can be used or secured, and then that way is exclusive of all others. A nuisance can only be abated by those persons who are affected by it. A statutory nuisance can only be abated in the way prescribed by statute, but if the statute makes no provision, it is to be abated according to the principles of the common law.

If a man has gone on the land of another and abated a nuisance, he may still bring suit. Abatement is not regarded as a punishment, but as a protection for the injured party. Instead of civil suit, there may be a public indictment. Cooley 2nd ed. p. 48 and 52.

BRILL v. FLAGLER, p. 191, New York. 1840.

Trespass for killing a dog. Plea, that the dog came day and night on the premises of deft. and snarled and howled to the great disturbance of his family; that plff. knew of this and wilfully allowed it to go on; that the only way for deft. to abate the nuisance was to kill the dog. Demurrer. HELD, that the matter set forth in plea constituted a private nuisance to deft., which he was justified in using all reasonable means to remove. No reasonable means could remove it short of killing the dog. Hence this was justifiable.

Suppose a man went on another's land and barked like a dog, would the owner of land have a right to shoot him? No. 58 N.H. 408. The

man would be a nuisance, but a nuisance can be abated only to the extent that it does injury, anything beyond that renders the abater a trespasser. Innocent third persons must not be injured. Clerk & Lindsell 118; Pollock 2nd ed. 282-284.

There are two kinds of nuisances, private and public. A private nuisance may be abated by any one that is legally damaged by it; that is, by any one who could bring an action against the maintainer of the nuisance; a public nuisance can be abated by any one whose right of common use is affected by the nuisance. A right of action against the maintainer of the public nuisance is not necessary to give a person affected by it a right to abate it. If one has one occasion to use the common right, he may abate a public nuisance affecting said use.

Mere apprehension of injury is not enough to justify an abating.

A man cannot tear down a building in process of construction, but can cut off eaves overhanging where rain will do damage, even before the rain falls.

A man has a right to go on another's land to abate a nuisance if he has a right of action against the maintainer of it. One cannot apply force to the person to abate a nuisance: Cooley 2nd ed. p. 49; Clerk & Lindsell p. 149; because it would be a breach of the peace.

If a person maintaining a nuisance ordered the abater to retire when he came on his land, he would have to do so. If attacked however, the abater could probably defend himself. Garrett on Nuisances p. 4 gives a list of acts which are neither public nor private nuisances,- acts tending to degrade public morals, as indecent exposure, etc.

SECTION VI. (continued).

(i) Miscellaneous Excuses.)

GILBERT v. STONE, p. 194, King's Bench, 1641.

TRESPASS FOR BREAKING HOUSE AND CLOSE. Deft. pleaded that twelve armed men by threats forced him to go with them and enter the house and close. Demurrer. HELD, that plea is bad. One cannot justify a trespass upon another for fear.

Compare this case with Smith v. Stone, p. 48. Defence good there because deft. was carried on plff's land by irresistible force. Here he had a choice between being hurt himself and hurting another, and he chose to hurt another. He had a choice and exercised it, in the other case he had no choice.

It is hard to reconcile this case with Piggott on Torts 88: "Necessity for preservation of life is a good plea in trespass." Probably the reason for the distinction between such a case and Gilbert v. Stone is that in the former a person acts purely instinctively and without the exercise of his reason. But even then he ought to be liable according to the authorities. Clerk & Lindsell 6, Cooley 181.

TAYLOR v. WHITEHEAD, p. 194, King's Bench, 1781.

Trespass for breaking and entering close. Plea that the close adjoining a lane of plff's over which deft. has right of way by prescription and that lane was overflowed so that deft. necessarily entered the close.

HELD, that this is no justification. Grant of a precise, specific way does not include grant of way over land anywhere, nor does it imply promise of grantor to keep way passable. It is not like the case of highways where the general good comes into consideration.

Distinction between Taylor v. Whitehead and Campbell v. Rice of course lies in fact that in one case we have a private way, in the other a public way.

53 Vermont, 487.

If the obstruction were so great that it would take a long time to remove it, taking it down, would not be necessary. One could go on another's land in that case.

This case is also reported 1 Gray's Cases on Property 284.

CAMPBELL v. Race, p. 198, Mass. 1851.

Trespassing for breaking and entering close. Deft. pleaded necessity resulting from impassable state of highways. Judge ruled that this constituted no defence. Verdict for plff. Exceptions, HELD, that English rule holds in this country, that a person may trespass on adjoining land when highway is impassable. Public convenience and necessity are paramount to private right. The right can be exercised only in case of necessity. Exceptions sustained.

OLIVER v. HYNDE and OTHERS, Common Bench, 1874.

Trespass, assault and battery. A curate was performing funeral rites over a body; plff. maliciously disturbed him. Deft. put plff. out. Argued for plff. that deft. had no official right to act as he did. HELD, that when persons are engaged in the service of God any one that disturbs them is a nuisance, and may be removed by any person there by the same rule that allows a man to abate a nuisance. Judgment for deft.

A statute providing means of punishing an act does not take away common law means of punishing.

ISELING v. ELLIOTT, p. 201, Iowa, 1869.

Assault and battery. Judge charged that in civil cases abusive words are a defence to an action of assault. Verdict for deft. Appeal. HELD, that provoking language does not constitute a defence in a civil action any more than in a criminal action. Farthest law goes is to allow great provocation of language to be shown in mitigation of damages. Judgment reversed.

Harsh words etc. would not mitigate the damages in cases of actual physical pain. It probably would in cases of damages for humiliation, etc. It is not clear on authority.

[illegible] v. BARR, p. 209, Miss. 1888.

Action for assault and battery. Verdict for plff. Appeal, assigning for error the fact that court below instructed jury that "drunkeness was an element aggravating said assault." HELD, that these words are wrong in criminal actions. In civil actions the point has not been adjudicated except with regard to libel, and there the authorities differ. But in this case the charge was undoubtedly correct. A drunken man advanced on a woman, brandishing a pistol and threatening to shoot. His

drunkenness was certainly an aggravation of the injury. Judgment affirmed.

Decision here probably correct, though generally drunkenness is no aggravation. It is no defence ordinarily in an action of tort. It may be where special intent is required. Bishop, Non-Contract Law Sec. 511; Harkey's Ele. of Law, Sec. 758; Pigeott on Torts pp. 216-217.

SECTION 91. (continued).

(j) Arrest without warrant, p. 208.

Anonymous, p. 208.

In many cases, private individuals and officers can arrest for a felony past or present, but never for a past misdemeanor, and in the case of present misdemeanor, only for breach of the peace.

This is the common law rule. In every state a statute exists extending the list of persons who may be arrested by an officer without a warrant.

If a private person arrests a man and makes a mistake, he must prove that a felony was committed, and that he reasonably believed the man was guilty. Officer only has to prove he had probable cause to believe the felony to have been committed.

SECTION 91. (continued),

(k) Justification by officer under judicial process.

CHASE v. INGALLS, p. 281, Mass., 1887.

Tort against deft. as deputy sheriff for alleged illegal arrest of plff. Plff. contends that the warrant was defective, as the magistrate who made it was attorney of party in whose favor it was made. HELD, that an officer is not liable for defect in his precept, provided such defect be not disclosed by the precept itself, nor known to the officer.

Legal processes must be issued by a magistrate having legal authority, must conform to a certain form, must not have on its face any evidence that magistrate had no power.

DEFINITION OF PROCESS.

A Process is any written authority emanating from a body having apparent legal power to issue it and purporting to authorize a ministerial officer to do some act which if done without legal authority, would be a tort.

PEOPLE v. WARREN, p. 229, New York, 1848.

Deft. was charged in lower court with assault and battery on a constable. The constable was trying to arrest him. Warrant was regular and sufficient upon its face. Deft. offered evidence to prove that the officer knew the inspectors who issued the warrant had no jurisdiction. The evidence was excluded. Exceptions. HELD, that as the warrant was regular on its face, the officer was authorized to make the arrest, regardless of whether he knew that the inspector had no jurisdiction.

If the officer knew the signature was forged, he could not protect himself. This case makes regularity on the face of the process the test of whether the officer is protected. 254 Cooley, 2nd Ed. 548-7
Here the paper was signed by the proper person.

HOWTON v. HUNDERHOLD, p. [illegible], New York, 1[illegible].

Trespass de bonis asportatis. Both parties were constables, and both claimed possession through writs of attachment. Plff. made the first levy, and for subsequent taking by deft. this action was brought. The attachments were regular on their face, but as a matter of fact were issued by authorities not having jurisdiction. HELD, that while such an attachment protects the officer against being sued, it does not give him a title sufficient to maintain actions against third persons.

4 Hun. 728 decides the other way, that priority of possession is enough to enable the plff. to maintain an action.

CAMPBELL v. SHERMAN, p. 225, Wisconsin, 1874.

Action against deft. as sheriff for unlawful seizure of plff's steamboat. HELD, that the court which issued the warrant was clearly exceeding its jurisdiction and encroaching upon U.S. courts. Where subject matter of suit is within the jurisdiction of the court, yet jurisdiction in the particular case is wanting, officer is certainly to be protected if he executes a process fair upon its face. But where the process itself shows that the court has exceeded its jurisdiction, the officer is not to be protected. Ignorance of the law will not excuse him.

This is certainly hard on the officer, it would require him to look out for unconstitutional statutes. This process here is not fair on its face, for it is not issued from a court having jurisdiction. This case is supported by weight of authority, though some cases are against it. 54 N.Y. 528.

LAMBUS v. MATTHEWS, p. [illegible], Maine, 1888.

Action of trespass against deft. as deputy sheriff to recover goods attached by him. Verdict for deft. Motion to set aside verdict, because in the suit in which the property in question was attached, judgment had been given in favor of owner. HELD, that the question of whether an officer is a trespasser in making an attachment does not depend upon the result of the suit in which the attachment is made. He levies on the goods for such judgment as plff. may recover against deft. and failure of plff's suit does not make sheriff a trespasser ab initio.

An important case. A writ is a command from the state to an officer. Lawyers get them from the courts, in blank, signed by the clerk and sealed. Lawyer fills one out and gives it to the sheriff. A sheriff has to give bonds of course for any omission of duty.

There are two kinds of processes, mesne and final. A writ of attachment or arrest is mesne process; a writ of execution is final process.

An officer is not responsible for obeying the law, he is bound to do that.

A sheriff seizes a debtor's goods at his peril unless he is ordered to take a certain specific chattel. There is a case of a sheriff seizing goods of a woman who was supposed to have married a certain man. The goods were seized as the goods of the man. This would have been legal if the marriage was legal. The marriage was illegal and the woman sued the sheriff for seizing her goods, alleging the illegality of the marriage.

are recovered. 9 Conn. 140 at 148-9

STATE v. COMMS and FULLER, p. 240, Vermont, 1838.

Indictment for resisting an officer in the execution of his office. Deft. offered to show that the officer, under an attachment against a third party, was attempting to seize deft's goods. Evidence excluded. HELD, that this evidence was properly rejected. An officer, under instructions to seize property is not bound to decide all cases of doubtful title at his own hazard. Whenever the question of property is so far doubtful that creditor and officer may be supposed to act in good faith in making the attachment, the owner of the property cannot justify resistance, but must yield the possession and resort to his remedy by action.

Resistance to officer is not allowable. The reason is that it is a breach of the peace. One is sure to be able to recover from the sheriff on his bond. The sheriff would be in a bad position, if a man could resist him. He has a hard enough time as it is on account of his liability for mistake on either side.

COMMONWEALTH v. KENNARD and OTHERS, p. 281, Mass., 1839.

Question whether if an officer have an execution against one person and he attempts by mistake to take the goods of another, can that person use force to defend his property. Court said that a man may use force to defend his person or property against others, not officers, and that a precept against A, is void against B, and an officer armed with a void precept is no officer as to that party, and a person is justified in resisting the attachment.

Property may be seized by the sheriff under a variety of writs. They are of two classes, (1) Those specifying the article to be seized, as in replevin, sequestration in chancery, or admiralty process. Here the sheriff seizing these goods has the full protection of the law. (2) Where the officer is directed to levy on enough to satisfy the plff's demand. Here the sheriff must find if it is the property of deft., and whether it is seizable under the writ, and must find enough to satisfy plff., if deft. has enough. Here if the sheriff errs in judgment, the court can afford him no protection as against the injured parties.

COMMONWEALTH v. CROFT and OTHERS, p. 284, Mass., 1865.

Indictment for a riot for resisting officer. An officer attempted to arrest one of the defts. on a warrant which gave no name or description by which latter could be identified. He resisted forcibly. HELD, that such a warrant is certainly void. The officer had no right to make the arrest, and was a trespasser. Deft. had a right to resist, using no more force than was necessary. Any third party may lawfully interfere to prevent an arrest under a void warrant.

If name is given in warrant and officer arrests another, he is strictly liable. If mere description is given and officer arrests one who answers to it but is not the party, it has not been decided whether officer is liable.

POOLER v. REED, p. 295, Maine, 1882.

Trespass for an alleged illegal arrest. Deft. justifies arrest as constable with legal mittimus therefor.

After election as constable he had accepted the office of justice of the peace. HELD, that this must be taken as a surrender of office of constable. He was still an officer de facto however, and while acting as such, his acts would be valid as between third parties. But when he is a party himself and justifies his acts as such officer, he must show a legal title to the office.

Point discussed thoroughly in 34 N.H. 18 and 58 Conn. 449.

An officer de facto is one who is not really an officer but who has the reputation of being one and is in the habit of acting as one under the color of authority. A sheriff is justified in acting on the process of a de facto officer.

GALLIARD v. LAXTON, p. 380, Queen's Bench, 1830.

A warrant had been issued to the constable and all her Majesty's officers of a certain county. One of the latter, who had had the warrant in his possession, but who did not have it at the time, arrested Galliard. Latter resisted and was indicted for assault in lower court. Question of illegality of arrest. HELD, that the warrant would have had to be produced if required, or else arrest would be illegal anyway. That being so, officer was bound to have it with him to be produced if required and not having, could not make a legal arrest.

Can lay hands on the party to be arrested, if you are a known officer, before you show your warrant. Warrant must be in officer's possession at the time of arrest; he must have a writ good on the face of it, must follow the directions of the process. He must show himself an officer de jure, in a suit against himself.

When an officer has a good process, he can attach the goods of the proper person in a pending suit. The result of the suit makes no difference. The owner cannot resist attachment of his goods, but may the arrest of his person.

The best discussion of justification under judicial process is Cooley on Torts, 2nd ed. about 528, 14 or 15 pages, especially 548.

An officer cannot justify under a process, if issued withoutthe jurisdiction, and that is apparent on its face, and it is no defence, if the process is in truth illegal, unless it is due to facts beyond his official knowledge.

Where the officer is himself a party to a suit, he must show a right de jure. Where others dispute over his right as an officer, it is sufficient to show himself such de facto.

When the ownership of property is doubtful and creditor acts in good faith, the owner is not justified in using force to prevent attachment.

Chapter 11,

Disseisin and Conversion,

(a) Nonfeasance.

Apparently there are eight essential allegations in the old form of declaration in trover; (1) Plff's property; (2) Plff's casually losing it; (3) Deft's getting possession by finding; (4) Deft's knowledge that it was plff's property; (5) Deft's intention to defraud plff. of

his property; (6) Plff's demand for it; (7) Deft's refusal; (8) Deft's converting and disposing of it to his own use. Later on several of these became as we shall se unnecessary.

At common law there were two forms of action to recover a specific chattel, namely, replevin and detinue. There were three forms of action to recover damages, viz: trespass, case and trover. Case is the same as trespass on the case. In 1285 trespass was the only form of action. To afford a remedy, one had to find a writ which exactly described the thing complained of. Often justice failed because no writ could be had. The statute of Westminster II was passed, Chapter 24 of which provided that if no writ could be found, the clerks in chancery should make up a writ and the action should be called case. Belles on important English Statutes. Assumpsit and trover were originally actions on the case.

Distinction between trespass and case.

The distinction was formerly very important. It is not so important now. If deft's act was a direct application of force, and damage followed immediately in point of time the doing of the act, then trespass might be brought instead of case, and if in addition, deft's act was wilful or intentional, then trespass must be brought instead of case. If deft's act was not a direct application of force, or if damage did not follow immediately in point of time, then the remedy must be case rather than trespass. Now as to the middle ground: if force was applied not intentionally but by negligence, and damage followed immediately, the better opinion was that plff. could bring either trespass or case. Baldwin v. Favor, 6 N.H. 465, sets forth the distinction both briefly and clearly. Walker's Am. Law 592-6 puts the matter somewhat differently from Prof. Smith.

TROVER was used originally only in cases of finding, and was then an action on the case. Its use has been extended by a fiction to cases other than those of actual finding.

We shall now consider the meaning of conversion in actions of trover. CONVERSION has different meanings in common law and equity. To decide whether trover lies in any given case, you had better decide first whether the act complained of is a tort, and secondly, if it is, whether it is a conversion.

TROVER is sometimes the only remedy for an alleged legal wrong. Sometimes it is concurrent with other remedies, as trespass, replevin, etc. And sometimes it cannot be brought at all. The question as to whether there has been a conversion is still important even in code states. In cases where there is doubt between conversion and a breach of contract, it is desirable to sue for conversion wherever that is possible, as the contract may be illegal.

MULGRAVE v. OGDEN, p. 887, Queen's Bench, 1591.

Action of trover for butter which deft. kept so negligently that it became of little value. Demurrer. HELD, that if finder uses the thing found, it is conversion and he is answerable in trover, but, for negligent keeping, he is not responsible in trover.

Precise point was whether a man was liable in trover for not taking

care of things found. Court said no, as he was not bound to take care of things found, but this rule is doubted now by some authorities. But decision is correct, as there was no conversion. Mere nonfeasance is not conversion.

ROSS v. JOHNSON, p. 287, King's Bench, 1772.

Trover for goods belonging to plff. which came into possession of deft., a wharfinger, directed to plff. They were lost or stolen. On demand by plff. and tender of wharfage, deft. did not deliver. HELD, that trover would not lie, it should be an action on the case. In order to maintain trover, there must be an injurious conversion, under which head a refusal to deliver goods does not come. Nonsuit.

What element of conversion is lacking here? Actual using of goods as owner, doing something, instead of mere nonfeasance. There is a breach of contract here on the part of deft., but a mere breach of contract is not conversion. This case differs from preceding one in that in Mulgrave v. Ogden there was no contract, but in this there was. Plff. could have sucessfully brought contract or tort. But if tort, the form of action should be case.

BARRAS v. ROLLINS, p. 288, Vermont, 1834.

Trover for a sled. Plff. had loaned it to deft. He asked latter to return the sled to his (plff's) house, where he got it. This deft. refused to do, but he made no objection to plff's taking the sled. HELD, that this refusal of deft's was no conversion, but at most only a breach of contract. A refusal to give up the sled would have been a conversion, but there was none such here. There was no assertion of any dominion over it by deft. inconsistent with plff's right.

Refusal to give up the goods of another, disputing his right to it, is conversion, but mere refusal to do something with the thing without disputing the owner's right is a mere breach of contract and is not a conversion.

THESE THREE CASES show that mere negligence, mere nonfeasance, mere breach of contract will not per se constitute conversion.

SECTION 11, (continued.)

(b) Destruction, or Change in Nature or Quality of a Chattel.

RICHARDSON v. ATKINSON, Nisi Prius, 1723.

They held that the drawing out part of the vessel, and filling it up with water, was a conversion of all the liquor, and the jury gave damages as to the whole.

If any essential change is made in the nature or quality of the chattel, it is a conversion. 2 Penn. State 294 allowed trover where a tree was cut down on another's land and cut into small wood and then left on the land.

SECTION 11 (continued.)

(c) Asportation.

BASSETT v. MAYNARD, p. 272, Queen's Bench, 1801.

If a stranger takes my chattels out of my possession, I can bring trespass or trover against him at my election.

A wrongful taking under a claim of right is a conversion, but a mere

wrongful taking is not necessarily a conversion. Nor is a wrongful taking necessary for a conversion. The wrong may be entirely subsequent to the securing of possession by deft.

JOHNSON v. BABB, p. 273, New Hampshire, 1830.

Trover for last-blocks. Deft. as sheriff had attached them on a writ, and the question in this case was whether he had exercised such dominion over them as to amount to a conversion, for which this action would lie. HELD, that as this was a valid attachment, it is to be presumed that deft. took possession of the goods (which is an essential element of a valid attachment.) Hence plff. must have been deprived of his dominion over them, and that is enough to constitute wrongful conversion.

The court said that there was a conversion, by reason of the attachment by the sheriff, as it prevented the owner from exercising a clear dominion; as sheriff claimed exclusive custody, the owner could not have clear possession, to do as he wished. It was a deprivation of plff., if not a disposition to the use of deft.

To assume control of goods and prevent the owner from using them amounts to a conversion.

RUSHBY v. WILLSH, p. 573, Nisi Prius, 1712.

Plff. and deft. were porters who had adjacent cupboards in a hut on the wharf, where they used to put goods, if the ship were not ready. Plff. placed some goods of A so that deft. could not get to his cupboard without removing them. He did remove them about a yard toward the door, and went away without returning them. They were lost. Plff. brought trover against deft. HELD, that there was no conversion. Deft. had a right to remove the goods so as to get to his cupboard. As to his not returning them, perhaps trespass might be brought, but clearly there was no conversion.

The case illustrates the principle that mere nonfeasance does not amount to a conversion. A serious question might arise as to whether he was bound to put the goods back in the place whence he took them.

FORSDICK v. COLLINS, p. 277, Nisi Prius, 1813.

Trespass for value of a block of stone. Stone had been placed by plff. on land adjoining houses of his. Deft. coming into possession of the land, refused to let plff. take stone away, and afterwards removed it himself to a distance. Argued for deft. that he had a right to remove it. HELD, that he was not justified in removing the stone to a distance, although he might have removed it to an adjacent place. He was guilty of a conversion.

It would not have been a conversion to have put the stone by the road side, as that would merely amount to excluding plff. from deft's land. If he carried it away a great distance, it would be an exercise of dominion over the stone.

FOULDES v. WILLOUGHBY, p. 277, Exchequer, 1841.

Trover for two horses. Deft. was manager of a ferry. Plff. embarked on the ferry boat with the two horses, for the carriage of which he had paid. He behaved improperly, and when deft. came on board he told

him he would not take the horses, and plff. must take them shore. This plff. refused to do. So deft. led them ashore and turned them loose on the highway. They turned up at a hotel a little later. Plff. demanded them and was told he could have them by paying for their keep, and that they would be sold for their keep. They were sold. Plff. brought this action. Defence was that horses were put ashore to induce plff. to follow. Judge charged that putting them ashore was a conversion and jury found damage for plff. Judgment was set aside, as court said mere asportation did not amount to a conversion, when there was no intention of making any further use of the chattel. If the object of putting the horses on shore was to induce plff. to follow, there was no exercise of any dominion over the horses inconsistent with or adverse to the plff's. To constitute a conversion there must be some use or some intention to use the goods, or the result must be a loss or destruction of the goods. The simple act of removal was not conversion. Judgment set aside on the ground of a misdirection.

The essential point of the case is, is the charge to the jury correct, that taking the horses and putting them on the shore was a conversion. Court held that it was not correct, as mere fact of putting them on shore was not a conversion. The ferryman made no claim to exercise any dominion over the horses. Interference with the owner's possession was only momentary. He undertook only to abridge plff's right of control at one place and in one direction. He set up no right of property in himself, nor did he attempt to acquire any. He did not dispute plff's general ownership.

"A momentary interference with owner's control, while not disputing his general right of ownership, nor changing the nature or quality of the chattel, does not amount to a conversion."

The destruction of a chattel is a conversion.

The judge might have charged that putting the horses ashore was a conversion, if the jury found (1), if horses were lost or destroyed, (2), if that followed as a natural result of deft's act; (3), if a reasonable man would have foreseen such a result; (4), and if deft. did foresee such a result or ought to have foreseen it.

The facts of the case make out a tort but not a conversion.

INTERFERENCE WITH RIGHT OF PROPERTY is a conversion, though it be but slight. To make interference with right of user a conversion, the right must be substantially abridged.

The point of the case is that a momentary interference with the owner's control or user, while not disputing his general right of ownership, nor setting up a claim to any special property in deft., nor changing the nature or quality of the chattel, does not amount to a conversion.

SECTION 11, (continued.)

(g) Miscellaneous Acts of Dominion.

KEYWORTH v. HILL and WIFE, p. 342, King's Bench, 1820.

Trover against husband and wife for converting a bond and two notes to their own use. Plea, not guilty. Verdict for plff. Motion in arrest of judgment, on ground that a married woman cannot acquire property,

hence cannot be guilty of conversion. HELD, that if conversion could take place only by an acquisition of property, this would be a strong objection. But this is not so, as conversion by destruction, for instance, shows. Essence of conversion is not acquiring of property by deft., but deprivation of property to plff. And that being so, after verdict, we are bound to imply that it was such a conversion as wife might be guilty of.

It was true then, but is not now, that a married woman cannot acquire property in her own right.

The court did not study the declaration as carefully on the motion in arrest of judgment as they would have on a demurrer. Such a declaration held bad on demurrer in 15 Gray, 585. The court said "in trover the foundation of the action is not the acquisition of property by the defts., but the deprivation of property to the plffs."

Here the matter came up on motion in arrest of judgment, where court, if there is any conceivable state of facts which could support the verdict, will hold that those facts were proved.

Momentary interference ending in destruction of the thing amounts to a conversion.

Mere asportation is not conversion unless it deprives owner of actual or constructive possession.

Mere asportation is any act by deft. inconsistent with owner's actual or constructive possession.

SECTION 11, (continued.)

(d) Defendant a Purchaser, Pledgee, or Bailee of a Wrongful Transferor.

CALVIN v. BACON, p. 287, Maine, 1853.

Replevin for a horse. Plff. had lent it to one Staples, who had sold it wrongfully, and after passing through two or three hands it finally reached deft. as a bona fide purchaser. Plff. made no demand on deft. before bringing this action. Hence deft. contended that the action could not be maintained. HELD, that if a party is rightfully in possession of property belonging to another, the latter must demand it before bringing an action; but if the taking is tortious, no demand is necessary. Whoever takes a thing without assent of owner or his agent, takes it, in the eyes of the law, tortiously; this holds a bona fide purchaser from one who had no right to sell, and against him therefore an action can be brought without demand.

This case, though an action of replevin, would be an unquestioned authority in actions of trover. "Good faith" alone is never a source of title, though it may often turn the scale in doubtful cases. Bacon obtained no title by the successive sales, as none of the sellers had a title which he could pass. His possession was tortious because the vendor's possession was tortious, and the act of purchase was a wrongful act inconsistent with the owner's title. Case is stronger still against the others, as they had not only purchased, but had transferred the property to another.

See 1 Cushing 586; 2 Hill 848; 3 Harv. Law Rev. 28-34, An article

by Prof. Ames on the old law, on this general subject.

Deft. would have been liable in trover without demand. Trover could have been brought against all or any of the four, but a judgment and satisfaction against one would have precluded action against the others.

McCOWEN v. DAVIES, p. 288, King's Bench, 1805.

Trover for tobacco. Plff., a tobacco merchant, had employed one Coddan as broker to buy some tobacco for him. Coddan did so, buying it in hisownname while it was in the king's warehouse. Then he pledged it to deft., who was ignorant of fact that it belonged to plff. Deft. was finally informed of true state of affairs and a demand made upon him, but he refused to give up the goods until paid the money he had advanced on them. HELD, that this was conversion. The assuming to one's self the property and right of disposing of another man's goodsis a conversion, and so is the taking by assignment from another who has no right to dispose of the goods.

Constructive possession is sufficient in trover. It arises when goods are in a warehouse and are transferred by delivery of an order or a key.

In case of a pledge the bailee has the right to sell the goods if he is not paid. A pledge is more like a sale than an ordinary bailment. Approached more to Galvin v. Bacon than Trowe v. Dennis.

Taking in pledge another's goods from a party who has no right to pledge them, is a conversion. Pledgee takes the goods and claims a title against all the world, not simply against bailor. This is the error of Spackman v. Foster, p. 290. A claim under a lien which does not exist, is a conversion. 4 C.B.n.s.228.

4 C.B.n.s.228 is a case on lien. Plff. had erected a building which projected unlawfully. Authorities directed deft., a surveyor, to demolish it. He did so and detained the materials as a security for expenses of taking down the building, in the bona fide belief that he was entitled to do so. HELD, to be conversion. Arbitrator found that plff. could not have obtained the materials without paying back the said expense. Court said, "We must give a reasonable construction to the finding of arbitrator," in answer to objection that intention to claim as lien had not been communicated to anybody.

See Clerk & Lindsell on Torts 189, 198, 199. "Factors Acts" would now protect a pledgee under similar conditions. Although deft. did not have actual immediate possession, he did have an order which would at any time give him immediate possession; he had constructive possession.

LORING v. MULCAHY, p. 292, Mass. 1862.

Tort for conversion of goods stolen from plff. deposited in deft's house with his knowledge, afterwards taken away by same persons who carried them there. HELD, that deft. did not convert the goods to his own use, but was a mere depository. It does not appear that he would not have restored them to plff. on demand.

Allowing goods to be brought into one's house and taken out again is a mere nonfeasance. Deft. did not affirmative act, nor was it shown that he intended to do anything to prevent the owner from recovering his proper-

ty.

A use of goods with possessor's permission and doing nothing to acquire or repudiate owner's title is not conversion.

FOCHT v. O'NEIL, p. 294, New Jersey, 1889.

Plff. left his plow on a farm with owner's consent, until he should come and take it away. Some months later the farm passed into the possession of one Hibler, plow still being there. A little later deft. borrowed the plow of Hibler, supposing him to be the owner, and after using it for a few days, returned it. A year later plff. informed deft. that it was his plow, demanded pay for it and the return of it. Deft. not complying, plff. brought trover. HELD, that conduct of deft. was not a conversion of the plow as he received it for temporary use only, and without any claim of right, and he exercised no dominion over it inconsistent with owner's right. His act may have been trespass, but was not conversion.

Deft. took property and used it, and claimed it merely as a borrower, not that he had any idea of ever acquiring a title to the property, or denying the owner's right. When he returned it, he returned it not to the owner, but to the party from whom he got it. So it differs from the case of Youl v. Harbottle, p. 204 of this volume of Cases, where the true owner bailed the goods and they were given up to a third party. But here in returning the goods to the bailor, deft. left the plow in the same situation as tit was when he obtained it. It would have been a conversion had the true owner revealed himself and forbade its return to the bailor.

See the remarks in note p. 299. The case is near the line, but the decision is probably correct.

SECTION 11, (continued).

(e) Misfeasance by Bailee.

PERHAM v. CONEY, p. 298, Mass., 1875.

Tort for negligence in the use of a horse and carriage hired by deft. of plff. with a count for the conversion of the same. Judge charged that if deft. hired the horse to drive to Lynnfield only, and in violation of that went beyond Lynnfield, it was a conversion and deft. was liable for any damage from whatever cause it arose. If his act was not in violation of the contract, then he is liable only for negligence. HELD, that this charge was correct.

Under the old forms of action, you had to bring trover for conversion and case for negligence. In Mass. the action is all one action for tort, but you have to set out a form of action and prove what is alleged.

The court here assumes that the driving beyond the stipulated place is a conversion. The weight of authority is that way. The damages are the value at the time of conversion diminished by the value at the time of returning it to the owner. The horse is entirely at driver's risk from time of conversion until time of return.

Accepting pay for the extra drive, with knowledge of the circumstance is a waiver of the conversion.

This case shows the difference between damages for negligence and conversion. In latter case, if owner refuses to take back the horse,

he can recover full value, according to weight of authority.

The decision has been affirmed in England. 25 N.H. 70 contains good reasoning in support of this doctrine. 1 Gray's Cases 827-8 contain an argument against it. 80 N.H.Rep.321 rejects the doctrine of the case. It is commented upon in 8 Harv. Law Rev. 280.

Depriving the owner of the use is a better expression than converting to one's own use in defining the word conversion.

A conversion may arise from an intentional breach of contract; Perham v. Coney.

SPOONER v. MANCHESTER, p. 299, Mass. 1882.

Deft. had hired a horse from plff. to drive from Worcester to Clinton. On the way back he unintentionally took wrong road, and when he discovered his mistake he took what he considered the best way back to Worcester. Question was, was this conversion. HELD, that it was not a conversion, as deft's act was not such as of itself to imply an assertion of title or right of dominion over the horse, nor was there any evidence of intention on this part to assert such title or right. Whether an act like this amounts to conversion depends on circumstances of the case and intention of party.

Valuable case. There is a difference between this case and Perham v Coney, p. 298. In P. v. C. deft. was aware that for the time being he was violating the contract. In S. v. M. there was no conscious violation of contract.

WENTWORTH v. McDUFFIE, p. 402, New Hampshire, 1869.

Deft. had hired a mare of plff. Judge charged that if deft. wilfully and intentioally drove the mare at such a rate of speed as to endanger her life, and he knew the danger it would be conversion; but it would not be, if the driving was merely negligent, and deft. did not know of the danger. HELD, that these instructions were correct. Driving beyond the appointed place is conversion, and such wilful and immoderate driving as in this case is certainly as marked an assumption of ownership and as substantial an invasion of bailor's right of property, as that is. Further, wilful destruction by bailee is conversion, and the bailee here may be held to have wilfully destroyed the mare.

The case is to be defended, if at all, on the ground of conscious violation of contract. It is not enough to drive fast in ignorance of the danger to the horse. If the doctrine of Perham v. Coney is correct, this case will stand. If not, it is doubtful. The case is analogous to cases on wilful destruction.

If pay is accepted on the return of the horse, the owner knowing that he has been driven further than the contract called for, such acceptance is a waiver of the right of action. In case the contract was so broken, Smith thinks that the owner may refuse to receive the horse when he is brought back and recover for his conversion. 64 N.H. 98. (Evens v. Mason)

In 64 N.H. 98, a man hired a horse to drive from one place to another and directly back. On the way back he stopped, put the horse in a stable and had him fed. The stable took fire and the horse was burned. It was

HELD, not a conversion. But this decision seems contra to the principles upon which Fernam v. Coney and Mentowrth v. McDuffie were decided.

Ordinarily a bailment is a personal trust, and to assign it is a violation of the trust and hence a conversion. 24 N.H.29. In some bailments this is not so; there it is no violation for the bailee to assign his interest.

YOUL v. HARBOTTLE, Nisi Prius, 1791, p.494.

Trover for goods delivered to deft. a common carrier. Another person claimed the goods, and deft. under a mistake, delivered them to him. HELD, that when a carrier loses goods by accident, trover will not lie against him, but, when he delivers them to a third person, though under a mistake, trover will lie.

If goods are lost through nonfeasance of carrier, action of trover cannot be sustained.

Compare this case with Frome v. Dennis, p. 294. There deft. before notice, restored goods to party from whom he got them, in good faith. In Y.v.H. deft. gave chattles to party to whom he was not entrusted to give them.

See note, p. 498.

The difference between accident and misdelivery is that the former is nonfeasance and the latter an act of an active agent.

This case differs from Spooner v. Manchester, as it comes nearer to a sale and there is more probability of loss of the property to the owner.

Misfeasance by a bailee is a conversion; breach of contract if intentional or unnecessary may amount to such a misfeasance.

SECTION II, (continued.)

(f) Defendant acting as Agent or Intermediary.

PARKER and ANOTHER v. GOBIN, p. 497, King's Bench, 1798.

A bankrupt went away leaving some plate with his wife. She delivered it to a servant to raise money on it. Servant went with deft. to a banker's, there deft. took the plate, pawned it in his own name and took the money back to bankrupt's wife. Trover was brought. Jury found verdict for deft., as he acted only as a friend. But in the upper court it was HELD, that a new trial should be granted on the ground of its being an actual conversion by deft., notwithstanding he did not apply the money to his own use.

Master cannot justify the act of his servant by ordering him to do what he would not be justified in doing himself.

Pltffs. were probably the assignees of the bankrupts. The defence was that he acted as a friend, pawning in his own name. This was a deprivation of property to the owner.

Clerk & Lindsell p. 127 say there are four sorts of conversion: wrongful taking; wrongful parting with; wrongful retaining and wrongful destruction. There can be no conversion where there has been no voluntary act, so goods lost or destroyed by accident are not converted.

In order to show conversion by wrongful retaining, you must show demand and refusal and deft. must have had the goods under his control at

the time. But refusal to deliver is only evidence of a conversion and not of itself conversion.

HOLLINS v. FOWLER, p. 811, House of Lords, 1875.

Trover. Appeal from Exchequer Chamber. Fowler & Co. were merchant Hollins & Co. brokers. Fowler & Co. instructed their brokers, Messrs. Rew to sell for them 15 bales of cotton. They did so, one Bayley purchasing them, claiming to be acting as agent for one Seddon, payment to be within 10 days. 5 days later Bayley offered them to Hollins, deft. in original action, who, having an order from Messrs. Nicholls, purchased them and later ordered them delivered to the latter, which was done. Fowler & Co. not having received payment within the stipulated 10 days, applied to Seddon and learned that Bayley's act was unauthorized. Demand was made on Hollins & Co. and on their failure to comply, this action was brought. HELD, that whether or not innocent purchaser is to be regarded as guilty of conversion depends on whether he would be excused for what he did if done by authority of person in possession, when that person was finder or bailee. If so, then bona fide ignorance of another's title would excuse him. If not, in the majority of cases he would not be excused. Applying this rule we find that the deft. was guilty of conversion.

THIS IS ONE OF THE IMPORTANT CASES ON CONVERSION.

It was not a sale to Seddon as Bayley had no authority and it was not a sale to Bayley because the plff. never intended to deal with him personally. 1 H. & C. 808, and 135 Mass. 238.

Had Bayley simply pretended to be worth property and the sale been to him, trover would not be maintainable here; but in this case there was no passage of title from Fowler. Hollins held the cotton for a half hour before he sold it. Hollins gave a delivery order for it and it was carried by Hollins' men in carts to the station. The cotton had been made into yarn at the time of the action. Hollins claimed that they acted only as brokers and agents for their principal. The jury found this to be true. The court erred in refusing to set aside the verdict as against the evidence. But the Lords reversed the decision on this ground which was unusual for them to do in such a case.

Blackburn discusses the case on the assumption that Hollins, though only agent, did acts assuming dominion over the goods. Sentence near middle of p. 818 is important point of the case.

The passage near the middle of p. 818 is worth committing to memory. The test there suggested will solve a great many difficulties, though not all.

Question is, whether defts. should be held liable for conversion in this case, if they acted only as agents. (In fact, probably, they were principals, quoad hoc.) Defts. negotiated the sale. Case is very close to the line. If a broker simply acts as broker, does not touch the property, but simply negotiates the sale, he is not liable for conversion. Here defts. knew that they were doing what purported to be a transfer of title, and were helping to do something which would change its form. See

112 Mass. 267, as to liability for conversion of carrier moving goods. See Clerk & Lindsell on Torts, p. 181.

If the carrier knows his act is the completion of a sale, by transfer of possession, he can beheld for conversion, otherwise not.

In this case, the Judges of England were called upon, under the old practice, to advise the House of Lords, who were not bound to follow the Judges' opinion.

CONSOLIDATED COMPANY v. CURTIS, p. 328, Queen's Bench, 189.

Trover brought by grantees under a bill of sale of furniture against auctioneers who sold the same by order of grantor in ignorance of the bill of sale. Auctioneer had sold the goods by request, and delivered them to purchasers. HELD, that mere sale without a transfer of possession would be no conversion. But where auctioneer having goods in his possession, delivers them wrongfully, troug innocently, to another, he certainly does an act inconsistent with owner's dominion over and property in the goods, and is guilty of conversion.

Auctioneers are liable for conversion if goods are sent to their rooms by one having no right to them, and they sell them and immediately turn the money over to the party from whom they are received. The reason is the auctioneer assists in passing title. Is also liable if he goes to a man's house, as by the course of business the goods are then transferred to the auctioneer and can only be delivered on his receipt, so he has possession of the goods with a lien on them. So he assists in the transfer of the property. The weight of authority is overwhelmingly in favor of holding the auctioneer. 158 Mass. 257. Agents are not liable if they merely take part in the negotiation, but are if they have anything to do with possession and delivery. 159 Mass. 257; 59 N.Y.Rep.419. Clerk & Lindsell 183, Holmes Com. Law p. 100.

The deft. here was merely an agent, but he did deliver the goods through his servant. Note testimony of witness on p. 328. The historical reason for the rule above as to auctioneers being liable for the conversion of goods sold on the order of one having no right is the desire of the common law to protect property. As trade and the transfer of property increases, this rule is likely to yield to one in favor of facility and safety of such transfer. Prof. Smith would oppose a statutory change of this rule, because if it were understood that good fith and ignorance of true state of title were defence, sham defences of that sort would not be held liable. See Holmes on Common Law pp. 97 to 100.

SECTION II (continued.)

(a) Miscellaneous Acts of Dominion.

TRAYLOR v. HORRALL, p. 245, Indiana, 1887.

Trover by Horrall against Traylor, Capehart and Cain. Plea, not guilty. Plff. had put his corn into a crib which he had hired on another man's land. Defts. and others being there, Capehart offered the corn at public sale, Traylor bid it off at the auction. Plff. was there and forbade anyone to sell or remove the corn. HELD, that there was no conversion, as there is no evidence that defts. ever had possession of the

corn. For anything that appears, plff. may always have continued in undisturbed possession and exercised all the rights of owner.

It is common to say that a purchse and sale are conversions, and that claim of title must be accompanied by an act involving a manual interference with the goods. A mere assertion of title verbally is not a conversion. Purchase alone will not constitue conversion; taking possession is necessary. Words alone will not constitut conversion, though they may be of importance to characterize the act.

If parties by a sale like this, cast a doubt upon the title of the true owner so he could only sell the goods for half their value, he has a remedy in "slander of title," by which he can recover his actual damages, but cannot recover for full value for conversion.

Taking a mortgage deed on another's property is not a conversion unless deed is recorded.

NELSON v. HAYWOOD, p. 240, So. Carolina, 1845.

Action on the case to recover the value of a slave. Three counts, one in trover. A slave belonging to plff. ran away. Presented himself as a free mulatto to deft., who was then travelling, and asked him to take him as servant. Deft. took him with him a while and then he disappeared. Verdict for plff. Motion for non-suit or new trial. HELD, that if deft's act amounted to an assertion of right as owner, he was guilty of conversion. Otherwise not. To determine this it must be known whether or nothe knew the negro to be a slave, whether or not he knew there was a question of property. To determine this there must be a new trial.

Here mistake was whether chattel was property or not. Natural presumption is that a horse, etc. is property, but natural presumption is that a man is not property.

Deft. was not liable unless the man was a slave. So a new trial was ordered in order to determine that point.

NICHOLS v. WATSON, So. Carolina, 1818.

Trover for wood on deft's land. Judgment had been obtained against deft. and an execution was levied on the wood, which was then sold to plff. as highest bidder. Plff. proposed to deft. that he be allowed to enter and cart off the wood. Deft. replied, if plff. came on his land he would sue him. The wood remained where it was and this action was brought. HELD, that after deft's prohibition plff. could not enter lawfully and peaceably He was under no obligation to enter and incur a lawsuit. Deft's act of refusal was clear evidence of conversion.

If plff. had a right to enter to get the wood, the court thought that there was no conversion unless there was physical force used to prevent it, but the court is wrong. Plff. was entitled to take the deft. at his word. Plff. had a right to enter, but was entitled to take deft's refusal and to bring his action.

Some of the court said, plff. had no right to enter on land, (but this is wrong) and consequently his refusalto give it up was a conversion.

Best view is that assuming the owner of wood has right to enter, the mere refusal to permit entry is not a conversion, unless the jury could

and did find intent of deft. to exercise dominion over goods as well as land.

If Plff. had a right to enter and deft. resisted him from entry, it would be conversion if he intended to resist taking the goods, and not merely to defend his land. 88 Eng. Rep. 77; 59 N.Y. Rep. 202.

WOLAND v. DE LAY, p. 257, Exchequer, 1872.

Trover for furniture. Plff. was holder of a bill of sale over household furniture of a tenant of one of deft's houses. Plff. had right to take the furniture in case of default in payment by tenant. Tenant having defaulted, plff. put a man in possession, and later sent two men with vans to remove the furniture. It was after sunset. Deft. was there, stated that rent was due, that he was going to destrain the next day, that he would not let furniture go. And he stationed a policeman outside to prevent removal. Plff. went away, leaving a man in possession. HELD, to be no conversion, as deft. did no act of interference, but only threatened. Even if he had prevented removal forcibly, it would have been no conversion, for he was not in possession and did not convert them to his own use. He would merely have prevented plff. from using them in a particular way. In order to have been guilty of conversion, he must have altogether deprived plff. from use of goods.

It was a race of two creditors.

It seems as if plff. had a right to take deft. at his word, and assume that deft. would have used force, so that it was not necessary plff. should actually resort to force. It does not follow that if you can not bring trover, you cannot bring any other action. Distress had to be made by daylight. See 4 Black. Comm. pp. 8 to 14.

Whether refusal to permit property to be moved will amount to conversion must depend upon the uses to which property can be put; sometimes said: "There must be a substantial deprivation of all beneficial use," in order to be conversion. In this case it would seem as if deft. virtually had possession, although jury found that he had not manual possession. See Bristol, v. Burt, p.854.

Stationing policeman was a decided act of interference with plff's property. An important question is whether a man's right of user is substantially taken away.

Deft's acts were naturally calculated to and did result in depriving the plff. of his property. deft. had practical control of the goods, if you look at the substance and not at the mere form of the action.

HIGHT v. BOIT, p. 881, Exchequer, 1874.

Trover for barley. Plffs. were commission merchants. They employed one Grimmett as their broker. In consequence of a telegram from him they shipped the barley in question to the railway station in Birmingham, and sent to deft. an invoice for the barley and a delivery order which made barley deliverable to order of consignor or consignee. Barley had in fact never been ordered by deft. Grimmett called soon after, and said it was a mistake, asked deft. to indorse the order so that he (G) could get the barley. Deft. did so; G. took the order, got the barley and absconded. Jury found that deft. acted in good faith, with a view

to correct an error and get barley back to plff. HELD, that there was a conversion by deft. as he did an unauthorized act which deprived another of his property permanently or for an indefinite time. If deft. had done nothing at all, plff. would have gotten the goods. He assumed a control over disposition of goods, and plff. will not get them. Hence there was conversion.

The barley was deliverable to the order of either the consignor or the consignee, so it was not necessary to endorse the order at all. The goods were in the hands of the railroad. Grimmett had ordered it sent to the deft. Deft. attempted to restore the goods through Grimmett, but Grimmett was not plff's agent and was not adopted as such for receiving back the goods. Deft. here acted under an honest mistake with intent to benefit the true owner, but if deft. had done nothing at all, the barley would not have been lost to the plff. Deft. was not in actual possession, but was in constructive possession which is sufficient possession to maintain trover.

SECTION II (continued.)

(n) Demand and Refusal.

BALDWIN v. COLE, p. 865, Nisi Prius, 1704.

Trover. A carpenter had been working for hire in the Queen's yard. Refused to do any more, whereupon the surveyor of the work would not let him have his tools. Demand and refusal were proved. HELD, that this was actual conversion, and not merely evidence of it. For, detaining another's goods from him without cause is assuming to one's self the right to dispose of them.

The decision is correct, but the reason given is wrong. Mere demand and refusal will not give a judgment for plff.,- is not, of itself, a conversion, but is merely evidence of it. Holt, C.J., was wrong in his reason.

GREEN v. DUNN, p. 872, Nisi Prius, 1811.

Trover for timber which deft. found on his premises. Plff's servant had put it there. Plff., the owner, demanded it of deft. Latter said he would give it up if plff. would bring any one to prove that it was his property, otherwise not. HELD, that this is a qualified refusal and no evidence of conversion.

The qualification must be reasonable. Not every qualification prevents a refusal from being evidence of conversion.

ALEXANDER v. SOUTHEY, p. 874, King's Bench, 1821.

Trover for goods which deft., a servant for an insurance company, had in his custody in a warehouse, and which had been saved from a fire, and placed in the warehouse, by the company's servants. Plff. demanded his goods, deft. said he could not deliver them without an order from the company. HELD, that as the refusal was not absolute but was qualified in a reasonable and justifiable way, there was not sufficient evidence of conversion.

Very unsettled question whether a servant can be said in action of trover to be in possession of his master's goods, so as to be liable in

trover. At present day, if servant did what might be called an act of misfeasance while he had the actual custody of another's goods, the fact that he was acting under his master would not exempt him. See as to possession in cases of larceny by servant, 2 Bish. New Crim. Law, sec. 824 et seq. As to civil liability in trover, Clerk & Lindsell on Torts, 178, 1 B.& S., 450.

SMITH v. YOUNG, p. 276, Nisi Prius, 1808.

Trover for a lease, to which plff. had a right. On demand, deft. said he would not deliver it up, but it was then in the hands of his attorney, who had a lien on it for a sum due him. HELD, that intention alone is not enough to constitute conversion. To make a demand and refusal sufficient evidence, the party, when he refuses, must have it in his power to deliver or detain the article.

It seems as if deft. might have been held liable for parting with the property, though that ground was apparently not urged. Would not giving property in pledge or lien amount to conversion? Case decides that if deft. has not property in his possession, and is therefore powerless to give it up, it is no conversion. See L.R. 1891, 2 Q.B.653, tending contra. Referred to in 5 Harv. Law Rev. 247, 254 and 6 Harv. L.Rev. 42. "Demand and refusal are never necessary as evidence of conversion, except when the other acts of the deft. are not sufficient to prove it." 5 Allen, 172. It is often desirable to have your client make a demand when you think it is doubtful if you can prove the acts which amount to a conversion. Usually necessary in cases of bailment. Presumption of conversion from evidence of demand and qualified refusal may be justified when qualification is reasonable. There must be no subsequent unreasonable delay after such qualified refusal, e.g., servant refusing to deliver without order of master, must deliver after reasonable delay to get order. In trover, law allows plff. to elect to compel deft. to purchase chattel as of the date of conversion; this is the basis of this action.

CARPENTER v. MANHATTAN LIFE INS. CO., p. 277, New York, 1880.

Action for conversion of plants, which remained on deft's premises as an accommodation to plff., and which deft. refused to deliver on demand on one Saturday, but told plff. on Monday he might have them. This suit was begun Tuesday. Judge charged that plff. was entitled to recover difference in market value on Saturday and Monday. HELD, that this is wrong There was a complete conversion and plff's right of action could not be destroyed without his consent. Receipt of the goods by plff. before or after action is commenced goes to mitigate the damages and no further. He cannot be forced to receive them back.

The case isone of controversy, but the weight of authority is with this case. Bish. Non-Contract Law, Sec. 401.

An unaccepted offer of return does not mitigate damages in trover. An accepted offer of return does reduce the damages, by the difference between the value of the property when converted and the value when received back.

As to damages. In case of conversion where there has been no return of goods, damage will be the value of goods with interest. Doubt as to when value is to be assessed. Three theories; 1st, highest intermediate value; 2nd, highest reached by commodity in a reasonable time after notice to owner and opportunity to replace it. 3rd, at time of conversion. This last, Prof. Smith favors. It is supported by more authority than the others.

There is a conflict of authority as to amount of damages recoverable in trover when deprivation of goods entails a great loss beyond their value. Probably no more damages could be recovered in trover; case or trespass should be brought. Plff. might sometimes be allowed to show that the chattel was especially valuable under the circumstances.

An accepted offer to return goods does not bar action of trover. It mitigates damages. Plff. has often been allowed to make his election between special damages for loss of service and interest, in addition of course to deterioration in value. [illegible] Rep. 484, very late case.

Does an unaccepted offer to return affect damages? If so, the property must certainly be in as good condition as it was when taken. Bishop's Non-Con-Law Sec. 401, very important statement. 7[illegible] Maine 477, opinion of ablest judge in this part of the country on results of unaccepted tender. See note on p. 479.

Declaration oin Trover.

Only two allegations are now essential in most jurisdictions. 1, plff's property, 2, deprivation by wrongful act of deft. Deft.'s knowledge as to plff's title, deft's intention to defraud plff., and deft's refusal to deliver on demand, all or any of them, may often be material in order to prove the fact of conversion, but they are not necessary elements of the definition of conversion, nor necessary allegations of a declaration in trover. See the 1896 rule of court in Wilson, Judicature Acts 5th Ed., p. 979.

Although the declaration sets forth plff's property, nevertheless all that is necessary is right to possession. 1 Gray's Cases on Prop., 958-9, note.

Example of Declaration in Trover.

"Plff. has suffered damage by the deft. wrongfully depriving the plff. of two casks of oil" (then declaration does not requiring manner of deprivation) "by refusing to give them up on demand," or "throwing them overboard out of a boat," specifying where the boat was. It amounts to this, the word "converted" is dropped and word "deprived" is used.

As to Definition.

"Individualize the term (to be defined) in as few words as possible."

Methods of making definitions.

1. "By making a digest." 2. "Frame a general proposition, including such elements, and such only, as are always essential to conversion, and excluding all those elements which are found in some cases, but are not essential in all cases." The difficulty is that such a definition is too broad, and the terms of the definition need defining. This kind of definition was invented by Lord Macauley; he gave a general defi-

nition, and then followed it by illustrations. E. "Enumerate all the distinct specific classes, which come under the head of conversion." The difficulty of this definition is its prolixity. See 2 Bishop New Criminal Law, Sec. 7[illegible]. note [illegible], and 1 Bishop on Marriage, Divorce and Separation, Sec. 1[illegible]. Include first, the idea of deft's voluntary act, 2nd, the idea of deft's possession. See Cooley on Torts, 2nd Ed., p. 525. Innes on Torts, secs. [illegible]-5-8. Piggott on Torts, [illegible], [illegible]. Distinguish between intention to act and intention to injure. See p. [illegible], Ames' Cases on Torts. For definitions of conversion, see Pollock on Torts, 2nd Amer. Ed. see 308. Cooley on Torts, 2nd Ed., p. [illegible]. Bigelow, Elements of Torts, 4th Ed. pp. 208, 218. One definition is "unauthorized acts of one in possession of a chattel, which constitute a (substantial) usurpation of the owner's rights." Prof. Ames' definition as given in Amer. Law Rev., p. [illegible] is "Any unauthorized dealing with the goods of another by one in possession, whereby the nature or quality of the goods is essentially altered, or by which one having the right to the possession is deprived of all substantial use of the goods, permanently or temporarily." Prof. Smith's definition is based on Prof. Ames' definition. Prof Smith says Conversion consists in any affirmative unauthorized dealing with the goods of another, by one who is actually or constructively in possession, whereby any one of three things happens. Either, first, the nature or quality of the goods is essentially altered, or second, the person having a right to the possession is deprived of all substantial use of the goods, permanently or for an indefinite time (for some extended period); third, the person having the right of possession is deprived of all substantial use of the goods temporarily or even momentarily by one acting in denial of the owner's (perfect) title to the goods.

Both Prof. Ames' definition and Prof. Smith's definition are made on the third method of defining.

On the general subject of the effect of a judgment in trover see 161 Mass., 472, same case in 37 North Eastern Reporter 750. The case is commented upon in 2 Harv. Law Rev. 172.

Short definition of conversion given by Prof. Smith: A conversion is any unlawful or wrongful dealing with the chattel of another, by one who is actually or constructively in possession of it by which (1) an essential change is worked in quality of the chattel; (2) the owner's right of user is substantially abridged, either permanently or for an extended space of time, or momentarily by one claiming title.

Jus tertii. If deft. connects himself with that third person (whose title superior to plff's he sets up as defence) he is justified the same as that person would be; but as to where he does not so connect himself, see discussion in Clerk & Lindsell on Torts 19[illegible] to 198; Tiedy on Parties, 256-7; 7 Law Quar. Rev., 224 to 242; the latter also as to measure of damages in a suit by bailee vs. wrongdoer; also as to law point L.R. 1 Q. B. 499, and a criticism of the last case in Vol. 98 Law Times, 196.

Further Note on Damages.

In case of a conversion where there is no return of the property and

the convertor has had the property for some time, damages would be the value at the time of conversion, with interest on the same since that time There is a dispute however as to the time when value is to be figured, in case of an article whose value has fluctuated. The three theories on this latter point have already been given.

In the case of a man who has tools and a monopoly of some trade, and his tools are taken so that he loses his business for say two months, he can recover only the actual value of his tools.

After an action of trover and a satisfaction of a judgment, the title to the chattel converted vests in the convertor from the time of the conversion.

In trover the party elects to choose to compel the convertor to purchase the chattel. Some authorities would allow the value at the time of conversion to be increased when the deprivation of the plff. entails a special loss beyond the value of the goods converted.

If goods are returned, acceptance does not bar the action, but merely mitigates the damages, by value at time of return. When property is returned some courts have allowed election between special damages and interest. [illegible] Sec. 489. If plff. refuses to receive chattel back, it does not bar the action. Owner does not ask to have the horse back, but to compel deft. to become an involuntary purchaser. 7[illegible] Maine 577, says that if goods are tendered back and refused, that plff. can recover full damages as otherwise it makes him dependant upon the wrongdoer's will.

Replevin is barred by a tender and refusal. 11 Howard's practice 17.

Deft's knowledge as to plff's title, and intention to defraud and refusal on demand may often be material and even vital, as matter of evidence to prove the conversion, but are not necessary to the definition of conversion.

Deft. must be in possession of the chattel to maintain trover. Plff. must have a possession, or right of possession. The man who has a title to goods, cannot maintain trover unless he has a right to an immediate possession.

A mere verbal claim to goods of another is not sufficient to make a conversion. See p. 1[illegible].

Most definitions are merely more general questions. 1[illegible] General Law Journal 1[illegible]-13[illegible].

[illegible] II (continued.)

(i) Excusable Conversion.

STEVENS v. [illegible], p. 5[illegible], Mass., 1[illegible].

In this case it was resolved, that if a man finds stray cattle in his field, he is not bound to impound them or retain them for the owner, but may drive them off into the highway without being guilty of a conversion.

It was not even a trespass here as the land owner had a right to drive cattle into the road.

VOLUME II,
Chapter 1, Legal Cause.

Bailiffs of Romney Marsh v. Trinity House.

Action for negligence. Declaration alleges negligent navigation of a ship of deft's. by their servants, whereby it was wrecked and ran foul of and injured sea wall of plff's. Facts were: a ship of defts', through negligence of captain, struck on a shoal 3/4 of a mile from the wall in question. It was blowing hard, crew lost control, and vessel was driven against the wall, doing the damage complained of. Contended for defts. that their negligence was not proximate cause of the injury. HELD, that negligence of defts. to render them liable, must be not merely one of the causes of the injury, but the proximate cause. It was so here. Immediate result of the negligence was to put their boat in such a condition that wind must necessarily drive it directly on wall. Judgment for plffs.

In these cases we must assume some wrongful act of the deft. and damage to the plff. and then see whether the act is the legal cause of the damages.

Wind and tide carried the vessel against the wall.

Bacon's maxim: in jure causa proxima, non remota, spectatur.

This must be construed liberally, and not literally, else it will mislead. It would seem to include natural elements as well as human antecedents, and so, is misleading. Logicians would say, with J.S. Mill, "The cause of an event is the sum total of all its antecedents." That of course would bar plff's action here, for plff. would have no right to pick out one antecedent and declare on it as the cause.

In this case the judges looked for the nearest proximate, but the principle of the case is that causal connection between the tortious act of deft. and the damage is not necessarily broken by the mere intervention of ordinary natural forces. This point was also ruled in 50 Fed. Rep. 810. This was a case where a telephone company had a right to put up its wires. It left the wires across the street a few feet from the ground for several weeks so that people passing struck it. A man was injured in a thunder storm. The deft. telephone company was held liable. Even on negligence p. 75-6, says the operation of natural forces is the inevitable result of human actions.

McDONALD v. SNELLING, p. 8, Mass. 1887.

Tort. Plff. was riding in a sleigh in Boston. One Baker was also out riding. Deft's servant, by negligent driving, ran into Baker's sleigh, smashed it, and frightened horse so that he ran away, ran into plff., broke his sleigh, hurt his horse and injured him severely. Deft. demurred, on ground that his negligence was not proximate cause. HELD, that a man is responsible for injury resulting from his negligence, when it is a natural and probable consequence of the negligence, that is, when it might reasonably have been anticipated. Here deft. started Baker's horse by his negligence. A natural and probable consequence was certainly the injury to plff. Demurrer overruled.

Some result of this general character was sure to follow.

The case stands for the point that causal connection is not necessarily broken by the mere intervention of the usual and natural actions of animals.

Here there was no intervening responsible human agency.

SCOTT v. SHEPHERD, p. 8 13 Geo. III, 2 Wm. Blackstone, 892.

Trespass for throwing a lighted squib against plff. whereby his eye was put out. Facts: deft. threw a lighted squib into the market house, where there was a large crowd; it fell on the gingerbread stand of one Yates; one Willis to prevent injury to himself and goods of Yates, instantly threw the squib across the market house, where it fell upon the stand of one Royal; he immediately threw it away, it hit the plff. and put out his eye. HELD, that trespass lies. The injury was the natural and probable consequence of deft's act. And as deft's act was originally unlawful he is responsible for resulting damage. Willis and Royal, acting as they did in self defence and on the spur of necessity, cannot be considered as free agents taking blame off deft. Judgment for plff.

This case is known as the squib case, and is one of the most famous cases in law.

For immediate and direct result of an act, trespass as distinguished from case was the proper remedy at this time. Blackstone, J., thought that no immediate injury passed from the deft. to the plff., and so trespass was not maintainable.

The case was sent up either for the court to look at the facts as jurors to see whether they would find for plff. or to get their opinion as to whether under these facts a jury could find for plff. on a correct charge as to the law of the case.

There is no doubt about the external acts in the case; the only thing in doubt was the mental state of the actors, whether they acted instinctively or as reasoning men, whether the intermediaries were free or compulsive agents.

The opinion of the majority stands for the point that causal connection is not necessarily broken by the intervention of the instinctive or irresponsible act of a human being other than the plff. or deft.

The nearest human wrongdoer was the deft.

In Laidlaw v. Sage, 40 N.Y. Supp.492, reported also in 80 Hun. 550 and noticed in Harv. Law Rev. January 1894 and December 1894, p. 225, the deft. requested the court to charge that if his act was involuntary or such as would instinctively result from a sudden and irresistible impulse in the presence of a great danger, he was not liable. The court refused and charged that the liability depended on whether or not the act was voluntary. This charge was later held bad: the court said the charge should have been the one requested by deft., for the act might be voluntary and still not be the result of an intention based on reasoning. An instinctive act may be voluntary, though not the intended result of reasoning.

In the squib case three judges thought it an impulsive and instinctive act on the part of the intermediaries. Blackstone thought that the intermediaries had time to reflect and accordingly he would have held

each intermediary liable. See Pollock on Torts 2nd Ed. p. 152 and 540.

In 55 A.R. 450, one boy twisted another about and sent him whirling against a third who pushed him violently aside, injuring him. The court held that the third boy acted instinctively and did not break the causal connection.

In 14 Minnesota 81 a team was negligently left untied and ran away, some men tried to stop it and in so doing frightened the team so that it injured plff. The court held that the acts of the intermediate agents were reasonable and not culpable and so did not break causation from the original wrongdoer.

Pollock 2nd Ed. 152, 540 inclines to take Blackstone's view of the facts in the squib case.

Jones v. BOYCE, p. 18, 1818, 1 Starkie, 493.

Action on the case against a coach proprietor for so negligently conducting coach that plff. had to jump off, in consequence of which his leg was broken. It appeared, that a rein had broken, one of the horses became unmanageable, driver turned to the side of the road, wheel hit something, and plff. jumped off to avoid injury. Allenoodough, to the jury: two questions must be answered, 1st, was proprietor negligent, 2nd, was it a result of that negligence that plff. was placed in such a position, that the prudent and proper thing for him to do was to jump. Verdict for plff.

Causal connection is not necessarily broken by the non-culpable action of the plff. himself, when that action is induced by and naturally resulting from deft's tortious act. Plff's act was an act of reasonable care and prudence; see 98 Minn., 394, 395.

MORLEY v. MOVILL, p. 15, 2 Geo. IV. R. Manning & Ryland, 105.

Case for negligence for throwing a bale of wool from a warehouse and injuring plff. It appeared that servants of deft. called out to some bystanders-by; that plff. looked up, saw wool coming, and ran directly into it. Judge charged that if plff. lost his presence of mind by act of deft. and in the confusion ran into danger, verdict must be for plff. Verdict for plff. Rule nisi. HELD, that charge was correct. Plff's loss of self-possession was occasioned by wrongful act of deft. and therefore deft. is liable for all that followed.

We must assume that deft. was in fault. Probably the fault was so plain that no instruction as to it was necessary. See Beven on Negligence, 147.

Here also if plff. hadn't done anything, he wouldn't have been hurt. The test set up in a case like this is, did plff. lose his presence of mind so as to be unable to reason.

The case stands for the point that the causal connection is not broken by the non culpable action of plff. himself, when pll's action naturally results from deft's tortious act. For instance, as in this case, plff. acting instinctively by reason of fright produced by deft's tort.

There is a very full discussion of this in 97 Am.Dec.288, note.

CRAMY v. NY.C.Central R.R., p. 16, Mass. 1859.

Action of tort for damages to wool delivered to deft. as common car-

rier to be carried from Niagara Falls to Albany. The goods were negligently delayed on the way for several days. Soon after being placed in deft's warehouse in Albany they were injured by a sudden flood, deft. not being negligent. HELD, that as a wrongdoer, is responsible only for the proximate and not for the remote consequences of his actions, deft. is clearly not liable. The flood was the proximate cause of the loss, defts negligence was remote and had ceased to operate before the loss occurred.

The last human wrongdoer test would make deft. liable in this case, so if we take that rule, we must admit certain exceptions.

Bish. Non-Con. Law Sec. 44 makes the point that the act of the last human wrongdoer may have spent its force.

Judge here had a faint foreshadowing of the test of reasonable anticipation of probable consequences. Prent many authorities sustain this. Contra, 54 N.Y. 500. See Cooley on Torts, 2nd Ed. p. 79, note 2. See as to warehousemen, 1 Gray, 277-291; Penn. 299. almost contra to two last cases is 55 N.E.Rep. (Ind.) 705. First two warehouse cases and reference to Cooley say: Deft's negligence was in a certain sense concurrent in point of time. See Davis v. Garrett, 6 Bing. 716, leading English case. Noted on p. 98 Smith Cases on Torts. This last English case is referred to in L.R.7 Q.B.Div.511. "Loss happened while the wrongful action was in force, and was attributable to the wrongful act."

GILMAN v. NOYES, p. 18, N.H.,1878.

Action on the case for negligence in leaving bars down whereby Gill's cattle escaped and were destroyed by bears. Court charged that if the loss would not have happened but for deft's negligence, he was liable. HELD, that this instruction does not set up the right criterion. Even when deft's negligence is a cause, it is a question of fact for the jury as to whether or not it is too remote. And the true rule is, that deft. is liable if the damage is the natural consequence of his negligence, and such as might reasonably be anticipated. But he is not liable if the damage would not have happened without the intervention of some new cause, the operation of which could not have been reasonably anticipated. New trial.

The "bear case". The lower court instructed that the "but for" rule must be the test. The Supreme Court disagreed with this and set up the probable consequence rule.

What is the difference between Mill's definition of cause and the "but for" rule? According to Mill's rule all antecedents are equally the cause; you have no right to pick out any one as the cause. The "but for" rule starts with practically the same premises, and then says you can pick out any single antecedent and consider it the cause. The objections to this rule are that remote antecedents would be considered causes; that conditions would be taken for causes, and that deft. is held liable if there is a tortious act of his in the chain of causation no matter how far back it is in the chain.

The "but for" rule is rejected by the great weight of authority.

Ryan v. N.Y. Central R.R., p. 97, New York, 1888.

Deft. through negligent management of one of its locomotives, set fire to one of its wood sheds. Piff's house, 120 ft. away, was burned. HELD, that deft's negligence is too remote. That a building on which sparks fell should burn is to be expected, but that the fire should spread depends on concurrence of accidental circumstances, and is not a necessary or usual result. Judgment for deft.

No trial by jury. The judge non suited the plff. The courts supported the non suit on the ground that wind, etc. are accidental circumstances which the deft. is not responsible for. The Romney v. Marsh case would have been decided differently if this rule had been adopted there. The true view is the deft. must notice the wind and other circumstances and that he is liable for the probable consequences of his negligence.

Great weight of authority is against this case. Apparently it decides that difference in ownership breaks causal connection. See 24 Hun 121, which is decided more correctly and is really against Ryan case. Denying Ryan's case, we can say that diversity in ownership of buildings burned or of the lands traversed by fire, or mere distance of locality, or the period of time between the burning of the buildings, do not necessarily (bearing in all cases) relieve the deft. from liability. See also 31 Hun 405. Potter, J. 50 Hun 191 carries out Ryan's case to reductio ad absurdum.

See as to right of insurance company over against negligent party, May on Insurance, fine Ed. secs. 454 to 455.

In 49 N.Y. 520 at 529 and 531 the case is answered but not overruled.

Wyman v. Jackson, p. 41, Michigan, 1874.

Action to recover damages for certain buildings alleged to have been burned by fire negligently communicated from deft's saw mill. Buildings destroyed were a hotel, and two buildings 5 and 8 feet from it. Verdict for plff. Exceptions to judge's charge that deft. was liable for value of last two buildings if their loss occurred without any other cause than simply the fire burning the first. HELD, that charge was correct. If the other buildings were destroyed by the burning of the first, no matter how far away they were, without any negligence of the owner, and without the fault of some third party as prox. cause, then he through whose negligence first building was burned is equally liable for the other.

Judge here carries out rule in Ryan's case to its logical and absurd conclusion.

The argument of Ryan v. The N.Y. Central R.R. that to hold the deft. liable might be ruinous to deft. was answered by saying that it was better to ruin one wrongdoer, than that innocent parties should have to bear a part of the loss.

Lawrence, J. in Kent v. Railway Co., p. 68, Illinois, 1871.

Lawrence J. considering Ryan v. N.Y. Cent. R.R. Co., which holds that where there is a fire communicated by a locomotive to house of A and thence to house of B, the latter cannot recover. HELD, that this distinction rests on no maintainable ground. The only just rule is, to determine whether the loss was a natural consequence of the negligence, which any

reasonable person might have anticipated, that is whether the negligence was a proximate cause.

Judge here says only question here is, shall innocent person suffer or his whose negligence was proximate cause.

WILMOTH v. [illegible] R.R. v. [illegible], p. [illegible], O.S., 1878.

Action to recover value of saw mill and lumber destroyed by fire negligently communicated from a steamboat of deft's to a grain elevator of theirs, and thence to the lumber and mill from 200 to 500 feet distant. Verdict for plff. Exceptions to judge's charge leaving question of proximate cause to jury, deft. claiming he ought to have held the injury too remote. HELD, that court was right in submitting to jury question whether burning of plff's property was a result naturally and reasonably to be expected from burning of elevator under the circumstances, and whether it was result of deft's negligence without the intervention of other causes not reasonably to have been expected.

The instructions to the jury were based on the probable consequence rule. This rule has the greatest support among the authorities and text writers.

[illegible], et al, v. [illegible], Co. R.R. Co., p. [illegible], Penn. 1877.

Action on the case to recover value of property alleged to have been destroyed by negligence of deft. A small ten mile line had obstructed deft's track. Ten minutes later a train came along, was derailed, oil cars burst, oil took fire, was carried down the river and burnt plff's property. Judge charged that deft's negligence was not proximate cause. Error. HELD, judge's charge was right. Facts being found, he had a right to apply the law to them, and in this case the law certainly is as he charged. Deft's negligence was not proximate cause of loss, because matter was not such a consequence as could have been foreseen as likely to follow.

Court ruled against plff. as a matter of law, without leaving it to jury.

The judge used "natural" and "probable" as synonymous. It is well to guard against it, as some courts use them in different meanings.

In [illegible] v. Jewett, [illegible] Equity 217, decided by the Vice Chancellor without a jury, and opposite result was reached. See note p. [illegible], Vol. II

[illegible] v. [illegible], [illegible], Brownson, 1[illegible].

Pollock, C.B.: "I doubt whether a person is responsible for all the consequences of his negligence. I consider the true rule to be that a person is expected to anticipate and guard against all reasonable consequences but not against those which no reasonable man would expect to occur."

Compare Pollock's statement with the next case.

[illegible] v. [illegible] & [illegible] Ry. Co., p. [illegible], Common Pleas, 1872.

Action for negligence causing burning of plff's cottage. Deft. Ry. ran near plff's cottage, grass, a stubble field, and a road lying between. A fortnight before the accident deft's servants had cut the grass. This they left in heaps by the railroad. It was very dry, and one day just after two trains had passed the grass land was found to be on fire. A

strong wind caused the fire to communicate to stubble field, thence to cottage. Held, that defts. are liable, notwithstanding that the consequence was not one which a reasonable man might have foreseen. This rule may be useful in determining negligence, but when negligence is once proved, party guilty of it becomes liable for its natural consequences whether he could have foreseen them or not.

Very important case.

The court distinctly rejects probable consequences rule in legal cause. It says it is important to determine negligence, but after negligence is settled, deft. is liable for the natural consequences of his act, whether the result could have been foreseen or not.

Also compare with Pargott v. Mayor of New York on p. 84 of Smith's Cases.

[illegible] v. [illegible], 50 Fy. Sc., p. [illegible], Wisconsin, 1881.

Issue: Action to recover damages for burning of plff's property by fire caused by deft's negligence. Men fighting the fire thought Plff's property was safe, so fought the fire elsewhere, but a strong wind sprung up, and the property was burned. Held, that as there was an intervening cause, not necessarily following from the first negligent act, without which plff's property probably could not have been burned, deft. is not liable.

Plff's farm was 1 1/2 miles away and the property destroyed was a cranberry patch. The fire was caused by deft's negligence five days before it extended to plff's cranberry patch. An extraordinary wind came up after the fire was started. This case is definite and distinguished from the Kenney v. Marsh case, in that in the Kenney case the wind was blowing at the time and here it was not, but came up later. Also here it was an extraordinary wind, a whirlwind. The judge thought that on the probable consequence theory this result is not one to have been anticipated.

[illegible] v. [illegible], Mo. Sy. Co., p. [illegible], Missouri, 1879.

Sparks from a locomotive of deft. set fire to the prairie at 2 o'clock in the afternoon. A wind, not unusual at that season, carried the flames alone about eight miles to plff's house which was burned the next morning. Held, that as there was no evidence of intervention of a new agency in destruction of plff's property, and as the wind was a usual one at that season, the damages are such as could reasonably be anticipated by a prudent man. They are the natural result of the fire.

The upper court here thought "natural" meant reasonably to be anticipated, it may also be used to mean that a result has transpired without any departure from the usual operations of nature, and without any extraordinary departure from the usual courses of nature. From these two statements, or cases, we can see, that the changes of the wind, either in direction or velocity, does not necessarily or always break causal connection. Ordinarily, a change of wind is a consequence reasonably to have been anticipated as probable.

51 Fed. Rep. 372 at 388: a not unusual change in the wind was not a break in causation.

The wind was not unusual and so the injury was held a proximate result. HILL v. WINSOR, p. 48, Mass., 1875.

Tort against owners of a steam tug for negligence of those in charge whereby plff. was injured. He was working on some piles which had been driven into the bed of the stream and had put in a brace to keep two of them apart. The tug struck them, knocked the brace out, the piles came together and plff. was severely injured. Judge charged that it was for jury to say whether the injury was a natural and probable consequence of deft's negligence. Exceptions. HELD, that charge was correct. If it was probable that injury in some form would result from deft's act, then deft. was negligent, and it is not necessary that the injury should have been foreseen in its precise form, so long as it now appears to have been a natural and probable consequence.

Colt,J., when he says natural and probable evidently means natural only.

This case modifies the probable consequence rule to a certain extent holding that it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen, and that if injury in some form should have been foreseen, deft's act was negligent and deft. is liable if it now appears that what in fact happened was a natural and probable consequence of deft's negligence.

SCHEFFER v. WASHINGTON, &c. R.R.Co., p. 49, U.S., 1881.

Action by executors of one Scheffer, deceased, to recover damages for his death, which, they alleged, resulted from negligence of deft. It appeared that owing to negligence of deft., a train on which Scheffer was collided with another. He was wounded, as a result went insane and finally, eight months after the accident, committed suicide. HELD, that deft's negligence was too remote. Proximate cause of Scheffer's death was his own act. It was not a natural and probable consequence of the injury received on the train.. Insanity and suicide are new causes, intervening to break the causal connection.

15 Wallace 580 held that a man's suicide while insane was not his own act, in the sense in which that term is used in insurance policies. Insurance policies provide that in case the insured dies by his own act, that the money payable on the policy shall not be recoverable. This holding is inconsistent with Miller's statement of the law in the principal case. To be consistent, the court should have said that Scheffer's death did not result from his own act.

The court adopts the probable consequence rule, holding that insanity and suicide were not a result naturally and reasonably to be expected from the injury received. "It was not the natural and probable consequence, and could not have been foreseen in the light of the circumstances attending the negligence of the officers in charge of the train." The proximate cause of the death of Scheffer was his own act of self destruction.

It is doubtful if the case shouldnot have been submitted to the jury in the same manner that Bishop v. The St. Paul City Ry. Co. was submitted.

BISHOP v. ST. PAUL CITY RY. CO.? p. 52, Minnesota, 1892.

Action to recover for injuries received by negligent upsetting of

of a car. It appeared that plff. was not apparently seriously injured, at the time, but gradually his health failed, and paralysis supervened. There was medical testimoney to the effect that this was caused by the injury. HELD, that deft's negligence was the proximate cause of the paralysis, if the injury received in the accident caused the disease in the course of which and as a result of which paralysis followed.

If the probable consequence rule had been applied in this case, the case would not have gone to the jury. But the court did not apply that rule. They held the deft. liable for all results arising naturally from the deft's act. They say "The injury received at the time of the accident was the proximate cause of the paralysis, if it caused the disease in the course of which, and as a result of which the paralysis followed."

The case is irreconcilable as a matter of law with the preceding cases.

Here the case went to the jury; in the preceding case the decision was on a demurrer. Perhaps the reason why in the preceding case it was not given to the jury is the fact that it is difficult to prove the origin of insanity. Possibly the court thought that fraud would get in if the case were left to the jury.

Earl J. in Ehrgott v. Mayor of New York, p. 54, N.Y., 1884.

Earl J., Rules holding a man liable for those results of his acts, which he ought to have foreseen are useless. The true rule is that a wrongdoer is responsible for the natural and proximate consequences of his misconduct; what are such consequences is generally to be determined by jury.

Here is another rejection of the probable consequence rule.

A woman in the earlier stages of pregnancy, so that it is unknown, can recover larger damages owing to her condition.

STEN v. LUYSTER, p. 55, N.Y., 1875.

Summary proceedings stat. provides that if the proceedings be quashed by Supreme Court, tenant shall recover any damage he may have sustained by reason of such proceedings. This was an action under this statute. Damages complained of were removal of property (personal), destruction of a building, loss of a box containing money which he kept in a part of the building used as a stable. Deft. objected that he was not liable for money which was kept in such an unusual place. HELD, that plff. is entitled to recover such damages as were the direct consequences of the acts of deft. If any part of the loss was occasioned by plff's act or could have been prevented by him, he cannot recover for it, but there is no evidence of any such loss here. The loss of all things including the money was the direct and necessary consequence of acts of deft.

The action was brought under statute allowing a man to recover for any damage he may have suffered.

The case differs from the other cases we have had in not being a question of negligence. The case does not adopt the probable consequenc rule. The court held that the deft. was liable for such damages only as were the direct consequences of the acts of the deft. In an action

on a statute the court here applies a different rule from what it generally applies in common law negligence.

CURTEN v. SAUNDERS and ARCHER, p. 57, Warwick Assizes, 15 Elizabeth.

Indictment for administering poison to Eleanor Saunders with intent to kill. It appeared that prisoner intended to kill his wife, gave her an apple with poison in it, she gave it to deceased, a small child. Prisoner told her not to, but did not try to take it away from deceased-HELD, that this was murder. Prisoner gave the poison with intent to kill a person and a person was killed. Though he did not intend to murder this person, yet it was murder in him for he was the original cause of the death. It is every man's business to foresee what wrong or mischief may happen from that which he does with evil intent.

A criminal case. It was long held that a civil action of tort for the death of a human being could not be maintained, but is changed now (generally by statute, sometimes by decision.) Today in a civil action the death of the daughter would be held to be the result of the father's act, in a case like the principal case. The result is perhaps not foreseeable, but the court would not adopt the probable consequence rule in case of a malum in se.

Causal connection is not broken in crimes by the act of an innocent agent, nor by the fact that an act intended to fall upon one person falls upon another. This is the doctrine of constructive specific intent.

HARRISON v. BERKLEY, p. 60, So. Car., 1847.

Trespass on the case. Deft. a shop-keeper, in violation of the statute on the subject, sold whiskey to Bob, a slave of plff's, by means whereby the slave became intoxicated and died. It appeared that the slave, after buying the liquor, drank himself drunk, fell down somewhere, and, the night being cold and misty, died from exposure. Judge left it to the jury to say whether the death was natural and probable consequence of deft's act. Verdict for plff. Deft. appealed, excepting to this charge and alleging intervention of another cause, exposure. HELD, that damage resulting from a wrongful act need not have been probable, in order for plff. to recover, but must be such as has actually ensued without occurrence of any extraordinary circumstance such that ordinary course of nature is departed from. Instructions were too favorable for deft. if anything in requiring that damage be probable. As to intervention of a new cause, it was one which deft's own act naturally brought into action, and so it does not break the causal connection.

In disposing of the case the judge below instructed the jury to follow the natural and probable consequence rule. The court above said on appeal, that this was too favorable for the deft. It held, that the consequences must be proximate and natural consequences. It said that by proximate was meant that deft's act must predominate over other causes. See p. 64 of Smith's Cases. This definition is not found elsewhere. The court said that by natural results is meant not results which could be foreseen, but those which followed directly without any great departure from the course of nature. Results might be natural looking backward, but not probable looking forward. The sentences setting forth these

ideas are among the most important we have on the subject.

1 Sedgwick on Damages, 8th Ed.,Sec. 112, has something to say which bears directly on Wardlow's opinion in Harrison v. Berkeley.

SALISBURY v. HERCHENRODER, p. 67, Mass., 1871.

Tort for injuries to building. Deft. occupied adjoining building. In violation to city ordinance he hung a banner sign across the street. In a gale the bolt which held the other end came out and was hurled across the street through plff's window. Judgment for deft. Appeal. Deft. contends the injury resulted from inevitable accident. HELD, that this would be an excuse if deft's act were lawful and he had used due care. But deft's act was wrongful and this wrongful act placed the sign in reach of the gale, and so was a proximate cause of the injury. Fact that a natural cause operates in producing an injury which could not have happened but for deft's unlawful act, does not make his act so remote as to excuse him.

Somewhat similar to Queen v. Saunders, ante. Court declined to apply "probable consequence" theory. Act here is malum prohibitum. All courts would probably agree with Queen v. Saunders, but some courts would not follow Salisbury v. Herchenroder. Courts frequently fail to apply "probable consequence" theory or rule as a liability in cases where deft's act is illegal in the sense of being specifically forbidden by law, especially if the illegality were of some magnitude.

If deft's act had not been illegal, he would not have been responsible if he had used due care. Why responsible here? Pollock, 2nd Ed. p. 28. "Commission of an act specifically forbidden by law or omission to perform any duty specifically imposed by law is generally equivalent to an act done with intent to cause wrongful injury."

Deft's illegal actwas continuous right up to the time of the injury.

WILBY v. WEST JERSEY R.R. Co., N.J., 1882.

Suit for destruction of trees by fire. It appeared that a fire started in dry leaves and grass near the track, just after train had passed. Deft's thought they had put it out, but later it started up again, and in spite of all efforts burned through the woods over a large tract of plff's land a mile from the station. Verdict for plff. Rule nisi. Deft. contends that second fire having been called to attention of tenant of land where it started, it was his duty to put it out if possible, and his failure to do so was negligence which broke the causal connection. HELD, that mere absence of interference does not break causal connection. Law requires that damages be natural and proximate consequences of deft's act. They were so here, as nearest culpable cause was escape of sparks from engine.

Here a third person failed to interfere. Failure of third person to stop consequences of deft's negligence does not relieve deft. Failure of person here was not a tort. See Innes on Torts, sec. 80.

Compare Hogle v. N.Y.Central R.R. Co., p. 94 and Loker v. Damon, p. 95, Smith's Cases on Torts.

ALEXANDER v. TOWN of NEW CASTLE, p. 70, Indiana, 1888.

Action for injuries alleged to have resulted from negligently permitting a sidewalk to beout of repair. Complaint charged that a pit was made by the side of the street and suffered by the town to remain uninclosed, whereby plff. without fault, was injured. Town answered that plff. was thrown into the pit by one Heavenridge, a man whom he, as constable, was arresting. Demurrer overruled. Judgment for deft. Appeal on ground that town's negligence afforded Heavenridge his opportunity, so was proximate cause. HELD, that Heavenridge, being an intervening, independent agency, and the immediate cause of the injury, breaks the causal connection between latter and deft's negligence. Judgment affirmed.

Here the human agent came in and did an act affirmatively which act was an intentional tort, and not merely an act of omission. Such wilful tortious intervention generally breaks chain of causation, if deft's act has ceased to operate actively.

VICARS v. WILCOCKS, p. 72, 47 Geo. III.

Action on the case for slander. Plff. declaredtht he had been employed by one J.C. as journeyman; that deft. circulated slanderous reports about him, whereby he was discharged by J.C., and also refused employment by one R.P. It appeared that J.C. had employed plff. for one year, and had no right to discharge him. Judge nonsuited plff. on ground that he had showed no special damage, as he had remedy against J.C. and law would not consider him as having lost that employment; and 2nd on ground that R.P.'s refusal was not on account of the words, but on account of former employers having discharged. him. Motion to set aside nonsuit. HELD, that special damage, to ~~as~~ sustain declaration must be legal and natural consequence of the words. Here it is an illegal consequence for which deft. is not answerable. O 2nd ground judgment affirmed. Rule refused.

In some cases as this special damage must be proved.

The employer discharged the plff. when he had no right to do it, so the court said his remedy was aganst the employer. The discharge the court said was not a legal consequence of the alleged slander. This case is a possible but doubtful exception to the last wrongdoer rule.

LYNCH v. KNIGHT, p. 74, House of Lords, 1861.

Action by Mrs. Knight to recover damages from Lynch for slander, uttered by him to her husband, special damage being that in consequence he her husband had forced her to leave his house. Majority of Law Lords held the conduct of husband was not a natural and reasonable consequence, and so there was no sufficient special damage. Lord Wensleydale held, that itwould be enough if the damages were such as, taking human nature as it is, might fairly have been anticipated and feared, and it was not necessary that they be such as would reasonably follow, Lord Ellenborough wrong in saying the damage must be natural and legal consequence of the words.

Wensleydale in this case differs from the view taken in the preceding case. He doubts whether the consequence must be legal, to allow of

special damages. Adopt ing this view, one would have to make an exception to the last human wrongdoer, and hold that if earlier wrongdoer intended that latter wrongdoer should act, the earlier ought also to be held if he foresaw the act of later wrongdoer, or if he ought to have foreseen the commission of later's tort as a result of his own. Plff. would have an action against wrongdoers.

Prof. Smith agrees with Lord Wensleydale.

BINFORD v. JOHNSTON, p. 75, Indiana, 1882.

Action to recover damages for death of plff's son. Two sons of plff., aged 12 and 10, bought of deft., a dealer in such articles, pistol cartridges loaded with powder and ball, for use in a toy pistol, deft. showing them how to use them. Shortly afterwards the boys left the pistol lying on the floor at home, and it was picked up by a young brother aged 3, and discharged killingone of the boys. HELD, that deft. was guilty of a wrong in selling dangerous article under these circumstances and so is liable for proximate consequences. Intervening agency does not preclude recovery if the injury was the natural and probable result of original wrong. Here, deft. was bound to anticipate ordinary conduct of children, and it cannot be said that anything that happened was unnatural or improbable. Further, deft's act was unlawful by statute, consequently he is responsible for all natural and proximate consequences.

Act here was more than negligent, it was illegal, specifically forbidden by statute. In such cases courts go beyond the probable consequence rule.

Deft. is liable for results more remote from the original wrong than he is in case of a simple act of negligence. Causal connection was not broken, as the intervention of the boys ought to have been foreseen, and the children here could hardly be called free or responsible agents.

CARTER v. TOWNE, p. 78, Mass., 1870

Tort for carelessly and unlawfully selling to plff. a child 8 years old, two pounds of gunpowder, which plff. fired off and was thereby injured. It appeared that the child bought the gunpowder June 27th, fired off part of it July 4th with consent of his mother, on July 9th, with knowledge of mother, took rest of gunpowder out doors, fired it off and was injured. Deft. requested court to change that there was no sufficient evidence to support a verdict for plff. Court refused. Verdict for plff. Exceptions. HELD, that as the gunpowder was in control of plff's parents several days before he was injured the injury was not the proximate, natural or probable consequence of deft's act. And court should have charged as deft. requested. Exceptions sustained.

Court regarded case as if parent had bought powder in first place, and given it to boy. Act of seller had spent its force when powder passed out of control of boy into control of parent. Act of seller was no longer a predominant cuase; predominant cause was act of parent. Here intervention of third person does break causal connection, although the intervention would not be a tortious one. Innes on Torts, 188.

This case differs from Aylie v. West Jersey R.R. CO. in that the in-

tervening parties owed a duty to the plff. to look after him.

7 Bingham 211: If A utters slander and B repeats it, A is not liable for special damage to reputation. If A asks B to repeat it, A would be liable, B being only his agent. If A utters it with the intent that B shall repeat it, and knows that B is likely to do so, A is liable. If A was indifferent as to whether B repeated it, but knew that B would probably do so, the authorities say that A would not be liable. But in reason A ought to be liable.

The latter two cases are exceptions to the last human wrongdoer theory.

Does it save A from liability if B repeats the story with malicious motive? That we shall consider later in Wars v. The Canal Co. p. 88 of Smith's Cases.

ILLIDGE v. GOODWIN, p. 80, 5 Carrington & Payne, 190, 1831.

Declaration stated that plff. possessed certain goods in a shop window; that deft's horse and cart through negligence of deft's servant, backed against the window and damaged the goods. It appeared that the servant was not there at the time, and evidence was offered to show that some passers-by struck the horse, which was a quiet animal, and had been left standing there by deft's servant. HELD, that if a man leaves a cart standing in the street, he must take the risk of any mischief that may be done.

Very frequently cited. Facts are not fully stated. Judge assumed that leaving a cart unattended in street was evidently negligence. Would be held generally today to be only evidence from which jury might find negligence. Case does not show whether third persons act was wilful or negligent. Nisi Prius case; judge did not speak with as much deliberation as if he were writing an opinion on appeal. "Any" in last line of opinion is too strong. See Beven on Negligence. 1st Ed. 980.

LANE v. ATLANTIC WORKS, Mass., 1872.

Tort for injury to plff. caused by negligence of deft. It appeared that deft. left a truck, with a bar of iron in it, standing in the street that the iron would easily roll off; that as plff. was walking by, a boy 12 years old, Horace Lane, called to him to come over and see him move the wheels. Plff. did so, result was that the iron rolled off and injured him. Deft. requested court to charge that Horace Lane's act was not negligence, but voluntary meddling, and this culpable conduct was direct cause of injury, plff. could not recover. Court refused, charged that if plff. was not negligent, intermediate act of Lane did not break causal connection if it was not an act which deft. might reasonably have anticipated. Verdict for plff. Exceptions. Held, that act of third person, intervening and contributing a necessary condition to injury will not excuse first wrongdoer, if such act ought to have been foreseen. The test is, what was probable and to be anticipated? It is a question for jury.

It is immaterial whether act of Lane was negligence or not as deft. ought to have apprehended. Exceptions overruled.

Important case. Frequently, person who did last wrongful act is the party liable, and here it was left to the jury whether or not the wrongful act of third person was reasonably to have been anticipated from deft's negligence. Comparing this case with Binford v. Johnston, ante 75, a boy may be responsible for some acts at 12 years of age, and not responsible for other acts. Here court supposed Horace Lane to be responsible. Plff. might have had remedy against Horace Lane. Court lay particualr stress on fact that Horace Lane did not intend to do harm, although he did the act. Here, deft. is liable, notwithstanding intervention of a third eperson who is regarded as a wrong doer; and third person who is regarded as a wrongdoer; and third person may perhaps be liable also.

MARS v. DELAWARE & HUDSON CANAL CO.? p. 83, N.Y., 1889.

Plff. was injured while on a train of deft. by a wild cat engine. The engine had been left on a side-track, with its fire banked in charge of an employe. He left it for a while, and in some way the engine was moved across several switches to the main track, and started up at full speed, doing the injury complained of. Plff. claimed that deft's -- negligence caused the injury. Judge charged that if one of deft's employes moved the engine, whether wilfully or negligently, deft. was liable. Verdict for plff. Appeal. HELD, that if the engine was maliciously started by some other person than the man left in charge, whether or not an employe, then deft. is not liable. Deft's act in leaving the engine was not the cause of an injury which could not have been foreseen as a natural and probable consequence. Intervention of criminal act of another party, being an intervention which was not probable, breaks the causal connection.

Landon,J., dissented on ground that whether or not deft. was liable, depended on whether or not the intervening act of third party was a probable consequence. Majority held that malicious intervention was such an unusual thing that they were almost inclined to say it always breaks causal connection, even though sometimes it should have been foreseen. Smith doesn't know whether the court intended to go so far as this or not; he thinks the case is certainly not so broad as that, though the principle generally holds good.

PASTONE v. ADAMS, p. 87, Cala., 1874.

Defts. were lumber dealers. Had piled some lumber in front of their office, the ends of some timber projected beyond the end of the building out into the gangway which led down beside. Plff. was walking along in front of the office, when somebody drove a cart through the gangway. A wheel caught the end of one of the timbers, doing plff. the harm complained of. Verdict for plff. Appeal, on the ground of human agency intervening. HELD, that if the timbers were negligently piled up by defts., the negligence continued until they were thrown down, and concurring with the other agency, was a direct and proximate cause of the injury. Judgment affirmed.

The negligence of the deft. continued from the time that the lumber

was piled until it was thrown down.

Supposing that the third party was negligent, who was the last human wrongdoer? In answering the question, note the deft's act was a continuing one.

VILLAGE of CARTERVILLE v. COOK? Ills. 1889.

Plff., a boy of 15, while passing along a sidewalk was negligently pushed from the sidewalk by another boy at a point where it was elevated some six feet above the ground and was unprotected by railing. Verdict for plff. Appeal, on ground that negligence of third party released deft. from liability. HELD, that the intervention of an accident or negligence of a third party does not break the causal connection between negligence of the village and the injury. Where a party is injured by concurring negligence of two different parties, either may be sued. Judgment affirmed.

The intervening third party here was negligent, not wilful. The negligence of the village began with the finishing of the sidewalk, and continued to the time of the accident. So both were concurrent at the time of the accident.

Where a city or town is liable under a statute for damages, because of the non repair of highway, there is a great difference of opinion as to the liability.

In some states the plffs. can recover only if the damage results solely from such negligence. This is held in Me. and Mass. 68 Me. to 155. That view is rejected in many states and is rejected by Prof. Smith. Mass. and Me. give a different construction to highway statutes than they do to other statutes.

In 148 Mass. 46-7 there is this significant sentence by Judge Holmes: "The general tendency has been to look back no farther than the last wrongdoer, especially when he has complete and intelligent control of the consequences of the earlier wrongful act." In 88 N.E. Rep. 894 a very recent case, something like Pastene v. Adams, suit was brought agains the third party. HELD, that the fault of this third party broke the causal connection and his act was the proximate cause.

See Clerk & Lindsell 880 and 882 on contributory negligence.

Courts are sometimes inclined to regard as a legal cause that one of two causes which began to operate latest and was in active motion at the moment of the danger.

MATHEWS v. LONDON STREET TRAMWAYS CO., p. 91, Queen's Bench, 1888. Plff. was a passenger on an omnibus. The driver turned on the tramway track to avoid a cart. A tramcar was coming along at the time, the driver pursued his course, and a collision resulted, plff. being thrown off. Judge charged, that to find a verdict for plff. jury must be satisfied that injury occurred solely through deft's negligence. Verdict for deft. Motion to set aside. HELD, that judge should have charged that if deft's negligence caused the accident it was no answer to say ther was negligence on part of omnibus driver. New trial.

It is definitely settled now that the passenger is not so identified with his driver that the negligence of the driver becomes the negligence

of the passenger. Both drivers were assumed to be negligent. The jury found a verdict for deft. because the judge had told them that to find for plff. they must find that the accident was due solely to the negligence of the tramcar driver.

The case is to be decided just as if two men who were out driving should meet and by the concurrent negligence of the two, they should collide and injure an innocent passer-by. The concurrent negligence of another will not excuse the deft. If deft's wrong is one of two or more concurring effcient causes (other than plff's fault) which co-operate directly to produce the injury, deft. is liable. If deft's act is the proximate cause, not necessarily the whole proximate cause, but a part of it, he is liable even if this part is much the smallest part. Bish. Non. Con. Law. Sec. 88, note 7, Beven p. 73.

Take this case: two dogs owned by different men killed some of the sheep in a flock. Each owner in the absence of statute is liable only for those killed by his own dog. This is not a case for an application of the principle just given above. 2 Shearman & Redfield on Negligence 4th Ed., Sec. 688.

Suppose A is walking on the street and is injured by the simultaneous negligence of B and C, A using due care. A sues B. B. says, "C was negligent also, and so I am not liable." One of two negligent persons is not excused because there was another; either is liable for the whole damage. Whether they are liable jointly is another question. Neither one can ask the court to apportion his share of the liability. Plff. however can get but one satisfaction. As to joint wrongdoers, see Cooley on Torts, 2nd Ed. 158-162. Smith's Cases chap. 16, pp. 669 to 713.

If there is concert of action between the wrong doers they may be sued jointly or separately. See Smith's Cases on Torts p. 669. Where there is no concert of action between the wrongdoers, they may be sued separately. In the principal case, the tramcar driver and plff's driver were simultaneously negligent.

HOGLE v. NEW YORK CENT. &c. R.R.Co., p. 94, N.Y., 1882.

Action to recover damages for injury to plff's woods caused by deft's negligence. Deft. requested court to charge that plff. could not recover if he neglected to use reasonably practicable means to suppress it. Court refused, holding that as plff. was not at fault in the origin of the fire, he was not bound to make any effort to suppress it. Verdict for plff. Appeal. HELD, that judge's charge was erroneous. Plff. perhaps would not be bound to use every possible effort to suppress the fire, but he should do what was reasonably practical. New trial.

See Kellogg v. The Railroad Co. p. 198 at 204 and 205, a case where plff. could have prevented the injury.

LOKER v. DAMON, p. 95, Mass., 1855.

Trespass quare clausum. Declaration that deft. destroyed part of plff's fence; cattle got in and destroyed plff's grass, so that he lost a year's profits of his close. It appeared that plff. allowed the breach to remain unrepaired for six months. HELD, that for direct consequences

alone of deft's act plff. can recover and not for remote consequences which plff. might have avoided by his own act. If plff. had not known of the broken fence it would be different. He did not know icf it and should have repaired it, and hence cannot recoverfor subsequent damage.

Note to Hogle v. R.R.Co. and Loker v. Damon:

In Mylie v. R.R.Co. ante 89, a third person had an opportunity to stop the fire, but did not do so, yet plff. recovered. Here, plff. had opportunity to stop fire. Principle here applied is called "rule of avoidable consequences." Damages, the continuance of which plff. might have prevented by his own reasonable care, cannot be recovered, for law will not permit plff. to ascribe the whole of his damages to deft., but plff. still has an action for damages which occurred before he could stop them. 1 Sedgwick on Damages, 8th Ed., sec. 204. Rule is one of limitation on amount of plff's recovery. Post, pp. 191 and 198. 9 Harv Law Rev. 80.

SUMMARY OF LEGAL CAUSE.

It is the most important subject in the two volumes on torts. Every case raises the question of legal cause.

Bacon's maxim= "In jure causa proxima non remota spectatur" furnishes no assistance in determining what is the proximate and what the remote cause. Bacon said "It were infinite for the law to consider the causes of causes, and their impulsion of each other; therefore it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any father degree." This is not to be taken literally. See Cooley on Torts, 2nd Ed., p. 88. The proximity of cause has no relation to contiguity of space or time. See 4 Gray 449; Bevan on Negligence 74, 88.

The theory of Mill is impracticable for as before shown it holds either all or none who were in the chain of antecedents.

THE "BUT FOR" RULE: It is similar to Mill's rule but it allows one antecedent to be singled out. It is objectionable because it allows a remote human antecedent to be held liable though there were others more wrongful and more proximate. It would allow the plff. to trace back the causation until he struck a capitalist. This rule is rejected by the great weight of authority. A case illustrating the use of this rule is Gilman v. Noyes p. 63 of these notes.

THE "PROBABLE CONSEQUENCE" RULE: Deft. is liable for such consequences only as a reasonable man standing in deft's place at the time of committing the tort ought to have foreseen as likely to happen. This rule is the most popular one. The first exception to this rule is, deft's liability is not limited to probable consequences in cases where deft's act was illegal in the sense of being specifically forbidden by law, especially if the illegality were of some magnitude. Salisbury v. Herchenroder, p. 89 in the Cases. The second exception to the rule is that it is not necessary that damage in the precise form in which it happened should have been forbidden, if deft. should have foreseen that some damage could happen. Hill v. Winsor p. 48 of the Cases. The third ex-

ception to the rule is: where deft. intended to produce the specific result which actually followed, deft. is liable, although that result was not probable. The fourth exception to the rule is: where the act is an intentional act done from a consciously wrong motive (that is, immoral acts, although such acts would not come within the purview of the criminal law), deft. is probably liable although deft's act is not specifically illegal. See 1 Bishop's New Crim. Law, note to sec. 827. These four exceptions are in the direction of extending deft's liability.

It is possible that additional exceptions to the probable consequence rule are fifth: the doctrine of Vicars v. Hillcocks, p. 72 of the Cases. This case is perhaps wrong however. See foot of p. 74 of the Cases. Sixth: the arbitrary limitation of liability for the spread of fire, adopted in Ryan v. N.Y.Cent.R.R.Co. This case is wrong. Seventh: the doctrine of avoidable consequences. These last three exceptions restrict the deft's liability.

The popularity of this rule is due to the fact that the cases are usually cases of negligence and negligence is determined by the acts of reasonable men. Then too, it enables the judges to unload the question onto the jury.

It is a serious question whether one rule should be sought for to cover all classes of cases - whether it might not be better to get different formulas for the different classes.

THE LAST WRONGDOER RULE: The legal cause is the last (or nearest) responsible and culpable human agent in the chain of antecedents, that is the one last before-the one nearest to-the happening of pltf's damage. Wharton on Negligence 1st Ed. App. bottom of page 828, also same volume sec. 85 to 89, secs. 134 to 145. Bishop Non Con. Law, secs. 44 - 41.

The first exception to this rule is that deft. is not liable if the nearest human wrongdoer that is, the deft. is a very remote link in the chain of antecedents. The force which he set in motion may have become exhausted or spent before the happening of the damage. This limitation brings the rule nearer to the "proximate and natural" rule. The second exception to this rule is, the last wrongdoer, although himself liable is not always the only one liable, an earlier wrongdoer may also be liable, first, where the earlier wrongdoer intended that his act should have the effect of inducing the later wrongdoer to do the subsequent tort; or, second, where the earlier wrongdoer foresaw the commission of the later tort as a probable result of his own commission of the earlier tort; and, third, (according to some authorities), where the earlier wrongdoer ought to have foreseen such result as probable. Lane v. Atlantic Works p. 80 of the Cases. Wharton on Negligence 1st Ed., p. 145. The probable consequence rule also has these last two exceptions.

THE PROXIMATE AND NATURAL RULE.

Proximate means predominating cause, natural means consequences ensuing without an extraordinary departure from the usual course of nature, even though not to have been foreseen as probable. The natural and proximate rule is: Deft. is liable if his act was the predominating cause and was not interrupted by any unnatural agency.

In using this rule, you take your stand after the accident, and not before, as in the probable consequence rule. The rule is not a good working rule; it has been expressed differently by different writers. Prof. Smith thinks it is the coming rule.

Perhaps the cases are harmonized by this rule which may be stated thus: Deft. is liable for -- the probable consequence of his acts and for such improbable consequences as result proximately and without any extraordinary departure from the usual course of nature. The 2nd, 3rd and 4th exceptions under the probable consequence rule would have to be stated as exceptions where one factor in bringing about the result was an extraordinary interposition of nature. The 4th exception given by the probable consequence rule would not have to be stated as an exception under the last wrongdoer rule. The 1st and 2nd exceptions to the last wrongdoer rule need not be stated under the proximate and natural rule.

Whatever rule of legal cause you adopt, having once established the causal connection, the latter is not broken by the mere intervention of:

1. Ordinary natural forces. Romney v. Marsh case, p. 1 of the Cases.

2. The usual or natural action of an animal. McDonald v. Snelling, p. 3 of the cases.

3. The irresponsible action (or instinctive action) of a human being other than plff. or deft. Scott v. Shepherd, p. 8 of the Cases.

4. The non-culpable action of plff. himself, when it naturallly results from deft's - tortious act. (a) Action of plff. while still in possession of his faculties and using due care. Jones v. Boyce p. 13 of the Cases. (b) So called action (unconscious agency) while acting instinctively by reason of fright produced by deft's tort. Mooley v. Sowell, p. 15 of the cases.

In closing the subject of legal cause, I may say that whatever rule you adopt you will find it all cut to sieves with exceptions. The result in a great majority of the cases will therefore be the same whichever rule you take.

CHAPTER II.

WHETHER PLAINTIFF'S ACTION IS BARRED BY HIS OWN WRONG.

FALCH v. WATSON, p. 97, Mass., 1858.

Action of tort for running down plff. while driving on the highway and breaking his sleigh. It appeared that deft. wilfully ran into plff. but he was allowed to introduce evidence to show thatit was done while the parties were racing for money. Judge charged, that if this was so, plff. could nkt recover. Verdict for deft. Exceptions. HELD, that while plff. could not recover if he had to depend on an illegal transaction, as the race here, it is equally true that where plff. does not rely on it, deft. has no right to escape consequences of a wilful act on the ground that both were engaged in an unlawful act.

The parties were both engaged in an illegal act. There is no rule of law that a man cannot recover for any damage which he suffers while doing an illegal act.

That proposition is true however in some cases, but in case of wilful injury, it is no defence to say that the injured party was doing an unlawful act. This was a case of a wilful act of a confederate. Keener on quasi contracts, pp. 274 to 275 says he does not believe in the test of whether or not plif. has to prove his illegal act in order to make out a prima facie cause of action. Two important deductions flow from this case. I. There is no general rule of law that a man cannot recover for any damage suffered by him at a time when he is himself acting illegally. (Pollock on Torts, 2nd Ed. 159, Broomes' Maxims 221.) II. Wilful and intentional infliction of damages on plff. can never be justified by the mere fact that he was at the time acting illegally.

SPEELE v. BURKHARDT, p. 92, Mass., 1870.

Tort for injury to plff's horse. Plff's horse and wagon were backed up against the sidewalk in violation of a city ordinance which provided that wagons should notbe so placed if only packages of less than 500# weight were to be unloaded. There was sufficient room for deft's servant to drive by, but he negligently ran into plff's horse. HELD, that while plff. was negligent in regard to keeping the ordinance, his negligence did not contribute to the injury. In order to maintain an action plff. does not have to prove his violation of law, for that depends on wight of packages, which is entirely immaterial to his cause of action. The fact that he was breaking the law does not leave him without remedy, provided he does not have to prove his breach of the law in order to maintain his action.

Deft. here was a stranger. Plff. although a wrongdoer (here plff. was breaking an ordinance) if damaged by the negligent act of stranger, can recover except when his own act is a contributing cause of his injury The last case showed that such a plff. may recover if damaged by the intentional act of a confederate in wrongdoing. Plff. was liable to the state for a violation of the ordinance, but his violation contributed nothing to his injury. If plff. had been acting legally, the accident might have happened just the same. For instance, suppose no such ordinance existed.

MORRIS v. LITCHFIELD, p. 101, N.H., 1857.

Bell,J. It is often said that a person who suffers from the negligence of another cannot recover if he was himself at the time a trespasser or acting in violation of law. This is not correct. For his trespass or wrongbe may be answerable, but that does not affect his rights as to other parties. He is entitled to recover unless it appears that his negligence or his fault has directly contributed to his damage.

In this case there was a statute that teams must pass on the right Plff. was on the left of the center of the road, but thought he was on the right. He met another team and in consequence of an insufficient railing on a bridge, was forced off the bridge. He sued the town.

The discussion by Bell J. is one of the best in the book.

CANNON v. WILSON, p. 106, Penn. 1888.

Action on the case to recover damages for destruction of goods.

Plff. had placed some of his wares on the sidewalk in front of his store. Deft's horse, through negligence, ran away, and coming on the sidewalk crushed plff's wares.. Deft. offered to prove that plff's act was in violation of a city ordinance. Judge ruled this out and charged that the wrong plff. might be doing to the city was not as between him and deft., such contributory negligence as would prevent his recovering in this action. Verdict for plff. Error. HELD, that there was no error in the rejection of evidnce, nor in judge's charge. Plff's violation of city ordinance was not a proximate cause of the injury.

Plff. was a wrongdoer, but the court did not regard his wrong as any part of the cause of the injury, and so allowed him to recover. The mere fact that the goods were there had no tendency to cause the injury. Had plff. put the goods out after he saw the horse coming, plff. could not have recovered.

Contributory illegality is a better phrase to describe what plff. did than contributory negligence.

McGRATH v. MERWIN, p. 104, Mass., 1878.

Tort for injuries received through deft's negligence. It appeared that plff. was working for deft. on Sunday, and was injured in working through deft's negligence. HELD, that he could not recover because he was working on Sunday which illegal act was inseparably connected with the cause of action and contributed to his injury. If the illegal act had not contributed to the injury, he could have recovered.

Plff. here was injured by the negligent act of another and that other was a confederate and not a stranger. The case is unlike Welch v. Wesson where the act was a wilful one. If the wheel had been started by the negligent act of a stranger plff. would probably have been allowed to recover, as plff's act would probably not be regarded as a cause. According to this case, the law does not recognize any duty of care by one confederate against another, but according to Welch v. Wesson, confederates must refrain from wilfully injuring each other. The case cannot be distinguished from Steele v. Burkhardt as to matter of causation, except that here the injury was inflicted by a confederate. According to this case, the law does not impose a liability upon confederates for negligence.

Was the illegal working by plff. a condition or a cause? It would seem that it was a condition, for the injury might have happened just the same onany legal work day-

WALLACE v. CANNON, p. 108, Georgia, 1868.

Action by widow of one Cannon against the R.R. on which he was an engineer, to recover damages for his death, alleged to have been caused by negligence of employes of R.R. Cannon's detrain ran into another, both being engaged in carrying Confederate soldiers and supplies. Judge charged that if Cannon was voluntarily engaged in performance of acts violating laws of U.S., and from that cause solely was killed, then he could not recover, but if solely through other's negligence he could. Verdict for plff. Error. HELD, that judge should have charged that if at the time Cannon was killed the railroad company and employes, inclua-

ing Cannon as well as those whose negligence caused the injury, were voluntarily engaged in an illegal act (transporting Confederate soldiers) then plff. could not recover. One offender against the law cannot set off against plff. that he, too, is a public offender in another distinct transaction. But when both have been engaged in same illegal transaction, then law gives no relief.

See 40 Ga. 52 (Brown, C.J., at 54, 58) 88 N.C. 582. The Confederate States had a government "defacto" at that time, which might possibly have legalized act of Cannon, under its orders. Court thought there was no duty of care where both parties were engaged in the same illegal transaction. Contra, Gross v. Miller, (Iowa) 81; N.W.Rep. 885.

BOSWORTH v. INHB. OF SWANSEY, p. 109, Mass., 1845.

Action to recover damages for an injury received through a defect in the highway. It appeared that plff. was driving on business on Sunday. There was a statute against this, except where it be necessary. Judge charged that plff. could not recover unless he showed that his business had to be transacted on Sunday. Verdict for deft. Exceptions. HELD, that this case comes within the principle that, in order to recover, plff. must show himself free from negligence or fault. Judge's charge was correct, that burden of proof is on plff. to show that his business was necessary, that is, that he was not engaged in an illegal act.

This case has caused much discussion. The legislature finally interposed and changed the law as to recovery in such a case.

The Mass. court in this case and Lyons v. Des. seem to have thought that illegal travelling on Sunday was the legal cause of plff's injury. The view taken in the principal case that the accident must be due to defect in highway alone, is peculiar to Mass.

LYONS v. DEWOLF-HLF, p. 110, Mass., 1878.

Tort for injuries to plff's horse caused by illegal negligence of deft. Plff., driving Sunday, hitched his horse at the side of the road behind deft's buggy. Injury was caused by deft's horse backing the buggy against plff's horse. Not certain whether or not deft. was negligent. Judge charged that fact that plff. was travelling on Sunday was immaterial, he could recover unless his negligence contributed. HELD, that this was wrong. Question is, did his illegal travelling on Sunday contribute to the injury? Necessarily it did, so he cannot recover.

The court said that if a man was travelling on Sunday it necessarily contributed to any injury sustained. This is error. Steele v. Burkhardt is right. The cases in other jurisdictions are overwhelmingly against the Mass. cases on the point of Sunday travelling.

SHIEL v. LAND, p. 112, Mass., 1880.

Tort to recover for damage caused by deft's dog. Plff. was driving on Sunday. The dog jumped at his horse's head and a smashup resulted. HELD, that plff. was doing an unlawful act, but it was merely a condition and not a contributory cause of the injury. Hence he can recover.

There is a statute in Mass. imposing liability on the owner for injury done by his dog even if the owner is in no fault in keeping that

particular dog. The case can only be distinguished from the last case by regarding the assault of the dog, the same as an assault by the owner, that is, by regarding the attack of the dog as a wilful act and by holding that the remedy for such an assault it is not barred by the fact that plff. was illegally travelling; or perhaps the statute imposes an absolute liability.

WALLACE v. MERRIMACK RIVER NAV. & EXP. CO., p. 114, Mass., 1882.

Contrary to law plff. was sailing his yacht on Sunday, when he was run into by steamer of deft., and for the damage he brings this action. 1st count alleged that defts. were careless and negligent; 2nd, that they were wanton and malicious. HELD, that plff. cannot recover on first count as his own illegal act contributed to the injury. But on the second count, his title to an action would be independent of his unlawful act, for the injured was caused solely by deft's wrongful act.

The court was consistent in applying the same rule to travelling on water that it does to travelling on land. It applied the doctrine of Welch v. Wesson to a case of intentional running down.

The statute of 1884 so changed the law that a violation of the Sunday travelling law is not a defence to an action of tort. See p. 115 note.

SUTTON v. TOWN OF WAUPATOSA, p. 115, Wisconsin, 1871.

Action to recover for injuries to plff's cattle, caused by the breaking down of a defective bridge. Plff. was driving them on Sunday. Court granted a non-suit on ground that, as plff. was violating a statute, he could not recover. HELD, that a distant wrongful act of injured party will preclude his right to recover only when it has the relation to his injury of cause to effect. Violation of the Sunday law had no such a relation to the injury in this case, the time of the action being wholly immaterial, and the plff's offence in no way contributing to produce the injury. Judgment reversed.

The fault of the plff. in order to preclude recovery must bear the relation of a cause to the effect produced by it. The opinion of Dixon, C.J., has carried the profession against the Mass. cases. It has carried writers abroad against the Mass. rule as to causation. See the note on p. 122 in which the Vermont court holds that Dixon is right as to causation but also holds that the law about defects in highways was not intended to apply to illegal travellers. See 12 R.I. 382. See Bish. Non. Con. Law sec. 82, 84; 59 Conn. 1.

Dixon was right as to causation but Ross was right as to recovery.

MEACOMB v. BOSTON PROTECTIVE DEPT., p. 123, Mass., 1888.

Tort for personal injuries sustained by plff., a cab driver, by a collision between his cab and a wagon of deft's. There was evidence that at the time plff's cab was projecting somewhat into the street in violation of a city ordinance. Deft. requested judge to charge that if plff's unlawful act contributed he could not recover. Judge refused, charged that violation of ordinance was merely evidence of negligence and

it was a question of contributory negligence. Verdict for plff. Exceptions. HELD, that if plff's violation of law contributed directly and proximately to the injury, he cannot recover, no matter whether his illegal act was negligent or not. Question of negligence is immaterial. Exceptions sustained.

Important case. Decides that plff. may be barred by his illegality although that illegality is not negligent. He may also be barred by his negligence, without illegality. Probably court below was right. Innes on Torts, sec. 42. Authorities in Jaggard on Torts, 924 to 925; 2 Rev. on Negligence, Ed. 1898. If plff. and his confederate is engaged in illegality, deft. (confederate) is under no obligation to use care; so held as a matter of public policy. Sec. 54 to 59 Bish. Non. Con. Law; Where compliance with plff's request would involve an affirmance of his own wrong as though it were a right, his suit will be rejected.

Notice the second instruction deft. requested court to give and which court refused, charging instead that violation of law was merely evidence of negligence.

In majority of cases since this, illegality is used as synonymous with negligence, but those cases are wrong and Judge Knowlton is right in drawing the distinction. If plff's illegal act is a cause of the injury, he cannot recover even though he was not negligent. Plff. may be barred by either illegality or negligence.

59 Conn. 1, supports this case.

C, doing an illegal act is injured by wilful act of B and negligence of A, has he an action? Against B, yes, whether B was a confederate or not; against A, yes, provided he is not a confederate and C's illegal act was not a cause. Law does not recognize and enforce any duty of wrongdoers to use care toward each other while engaged in an illegal transaction.

Plff. may be damaged (1) by the wilful act of a stranger; (2) by the negligent act of a stranger; (3) by the wilful act of a confederate; (4) by the negligent act of a confederate. He could recover in the first three cases, but not in the fourth.

He cannot recover against a confederate, on account of public policy as the law does not recognize and enforce any duty of mutual wrongdoers to use due care towards each other, though it will enforce a duty not to inflict wilful injuries. Plff. is barred by negligent act of stranger, if his own illegal conduct is the cause or one of the causes of the damage. He can usually recover in any case for the wilful act.

CHAPTER III.

NEGLIGENCE IN RELATIONS NOT ARISING DIRECTLY OUT OF CONTRACT. STANDARD OF CARE. DEGREES OF CARE.

Actions of Tort frequently arise out of contracts so that there might be a choice of remedies between contract and tort. This chapter consists of cases not arising out of contract, though contract cases will often be used to illustrate what is meant by negligence.

BLYTH v. BIRMINGHAM WATERWORKS CO., p. 180, Exchequer, 1856.

Action to recover for damage sustained through negligence of deft's. in not keeping water pipes and apparatus in order. The apparatus had been in position 25 years, had always worked well, but just before the accident one of the severest frosts on record occurred and prevented the apparatus from working properly. Question was, whether there was any evidence of negligence. HELD, that there was not, as defts. did all that prudent and reasonable men would do. They were prepared for ordinary winter temperature, and are not negligent simply because their precautions were insufficient against the effects of an unusual frost.

Frost was so severe that no human being could have foreseen its severity. 107 Mass. 492. 2 Denio 441. 54 Mis. 107. Dam. Cases. Compare all three.

Alderson's opinion here is the most famous on the subject of negligence. His rule as to negligence is good. His application of it to average temperature is not good, as he ought to have considered whether there were periodic or occasional extraordinary frosts. In the latter case, one ought to anticipate such frosts and guard against them.

See Pollock on Torts 1st Ed. 47 - add to Alderson's definition, "Provided, of course, that the party whose conduct is in question is already in a situation that brings him under the (legal) duty (toward plff) of taking care." Requisites to action of Negligence are (1) Legal duty of deft. to use care, using legal duty as distinct from moral duty. (2) A legal duty owing from deft. to plff. (3) Breach of, or omission to fulfill, the duty. (4) Damage resulting in a legal sense from the breach. See 65 Vt. 522 where deft. violated statute but damage would have happened notwithstanding violation. (5) Damage so resulting to plff.

Pollock 2nd Ed. 552. 8 Harv. Law Rev. 388, N.2. Holmes on Com. Law 152 to 191. 107 Mass. 402, 2 Denio 441.

REX v. WM. SMITH, p. 193, 2 Carrington & Payne, 449, 1828.

Indictment alleged that George Smith, an idiot lived with prisoners, his brother and sister; that they neglected and refused to take sufficient care of him, whereby he became weak and sick. HELD, that defts. were not legally bound to take care of the idiot, and though there was negligence, nevertheless omission without a duty will not create an indictable offence.

Important decision. Same view probably would be taken in a civil case. Not criminally liable for neglecting a moral duty, but is for legal duty.

The defence was that there was no legal duty in defts. to look after and maintain their idiot brother.

REGINA v. JUSTAN, p. 188, High Court, Queen's Bench Div., 1898

Indictment for manslaughter. Prisoner was a woman between 30 and 40 years of age, who had been living in house of deceased, her aunt 78 years old. Latter became helpless through illness, but prisoner gave her no food, procured no medical attendance, and gave no notice to neighbors. It was contended for the prisoner that there was no legal

duty in prisoner to care for her aunt. HELD, that it was certainly the moral duty of prisoner to care for deceased and failure to discharge it hastened latter's death. Every moral duty is not a legal duty, but in this case, it is certainly within the spirit of the decisions to say that there was a legal duty.

The same case is reported under the name Regina V. Instan in 1 Q.B. 450 (1893) and in Beale's Cases on Crim. Law at page 188.

This is a weak opinion. The case does not expressly overrule the preceding one though Coleridge implies as much. He was not as good a lawyer as Day,J. whose charge to the jury that if there was an implied undertaking to provide for the deceased, deft. was liable, is much abler than Coleridge's opinion. The jury found there was such an undertaking. See 2 Bish. New Crim. Law, sec. 659 to 662.

See 88 N.Y. 464.

Coleridge's remarks about legal and moral duties are illogical.

SMITH v. TRIPP, p. 187, R.I., 1880.

Trespass on the case. Declaration, that city of Providence kept its streets so negligently as to cause water to flow on plff's land, which otherwise would not have done so. Demurrer. HELD, that plff. has not stated a good cause of action. It is not enough to state that deft. was negligent, without stating what duty he owed plff. In the case at bar deft's duty was to keep the highway in repair for travel, it owed no duty to plff. to keep the highway in such a state that water should not flow on his land.

The court here assumed that plff. could not recover against a neighbor for water turned on his land in likemanner. He sued the city under a statute requiring the city to repair the highways, but he could not recover for the city owed him no duty in the matter. Its duty was to persons travelling on the highway. Actionable negligence is a failure to discharge a legal duty owed to the person injured. To recover (a) plff. must show that he is one of the class intended to be protected by the statute. 6 R.I. 211. L.R. 9 Ex. 125. (b) The mischief done must be of the kind intended to be prvented. Authorities in 20 S.E.Rep. 557-558.

There are five requisites for an action for negligence: (1) legal duty of deft. to use care; (2) legal duty must be owing from deft. to plff. (3) breach of duty, (4) damage resulting in a legal sense from the breach, (5) damage so resulting to plff.

The proper sense in which to use negligence is negligence not arising from the thing done, but arising from want of proper care and forethought in doing it. A man is not generally speaking liable in negligence for an omission; as a rule, there must already be some existing relation of duty. Then liability is incurred by the voluntary act of deft. by doing something thereby bringing himself under a legal duty to take care in doing it.

60 N.W.Rep.669. Statute compels railroad to protect frogs in yard so that people there should not get their feet caught. Trespasser got

his feet caught, train came along and injured him. Court held he could not recover as duty was not owed him.

8 R.I. 211. Statute provides that railroads shall erect a sign at every grade crossing, ring the bell of engine; gives damages to any one injured from failure to do this. Man walking along track is injured he cannot recover. The law not intended to protect him.

L.R. 9 Ex. 125. Cattle carrier had to have ship divided into pens, so as to prevent spread of contagious diseases. Carrier neglected to do this, cattle were washed overboard owing to absence of pens, can owner recover? No, because that was not purpose of statute. Statutes in some states require that he who cuts a hole in the ice must put up a sign to mark the place. Plff's horses got frightened, ran into a hole left unguarded, can plff. recover? No. 65 Vermont 8[illegible].

VAUGHAN v. MENLOVE, c. 199, 3 Bingham's New Cases, 468, 1837.

Deft. owned land near cottages of plff. Near the boundary of his land he has a hay stack which was likely to ignite and so was dangerous to plff's cottages. Deft. knew it was dangerous and had been advised to remove it, yet he left it there. It became ignited by spontaneous combustion and plff's buildings were thereby set on fire. Judge charged deft. was bound to use such reasonable caution as a prudent man would have exercised under the circumstances. Verdict for plff. Rule nisi, on the ground that question should have been not did deft. come up to average man standard, but did he act bona fide, to the best of his judgment. HELD, that judge's charge was correct. Deft's duty was to enjoy his own property so as not to injure that of another, and for his negligence he was liable. Test of negligence always is, what would have been theconduct of a man of ordinary prudence under the circumstances?

Important case. In 87 Fed. Rep. 659 at P. 668 Court should have said, "Under similar circumstances."

The law leaves deft's personal characteristics out of account and applies as a test what the average prudent man would do. The jury is not to apply their own views but what they think the standard of society is. 89 N.E.Rep. 86 and 87 (Mass. case.) 14 Law Mag. & Review 4th series 817 to 828, article on average man. See Holmes on Com. Law 108 to 111.

MEREDITH v. BLOOD, p. 142, Indiana, 1888.

Action to recover for an injury done to plff's mare by deft's stallion. In some way the stallion had escaped from the stable and done the injury complained of. Verdict for deft. Error assigned, plff. contending that deft. was bound to the utmost care, deft. contending he was bound to ordinary care only. HELD, that ordinary care is all that was required; what is ordinary care varies with the circumstances of each case and refers to such case as a prudent careful man would take under the circumstances.

This case suggests as a test what in fact an ordinary and prudent man would do in a similar case, not whether deft. bona fide believed that

he was doing what an ordinary and prudent man would do. This makes the rule of law the same for all cases, but the amount of care necessary varies according to circumstances. The case therefore advances the theory that there is only one dgree of care. In case of deft's blindness, the question would be, whether an ordinary and prudent man suffering from that incapacity would do what deft. did. Holmes on zCom. Law 109.

Negligence is a negative conception and is simply means the absence of the care reluired. So there can be no degrees of negligence. There is a dispute as to whether there are degrees of care. Some say there are no degrees of care; others thatthere are two degrees of care and still others that there are three degrees of care. (1) Only ordinary care under the circumstances. (2) The care of one who is a specialist and that of one who is not a specialist. (3) Great ordinary, and slight care. This is the old rule. It was known to the Roman Law and the early Common Law.

Prof. Smith thinks that there are no degrees of care. He agrees with the selection from the Albany Law Journal on p. 149 of the Cases.

In torts, negligence is the absence of care under the circumstances and there can be but one standard of care, "under the circumstances."

In a contract the parties may agree upon any degree of care they choose. Most of the cases which raise the question of degree of care arise out of a contract, and so the conclusions therein reached are not necessarily applicable in torts.

There is a celebrated short definition by Willes,J. in 5 H. & N. 899: "Negligence is the absence of care according to the circumstances." Clerk & Lindsell, 355 and 356. Prof. Smith thinks that the best rule is that of ordinary care according to the circumstances. See 39 N.H. Rep. 86. There is an interesting discussion Pickard in 14 Law Mag. & Rev. 4th series, pp. 817 to 829.

CHAPTER IV.

Contributory Negligence.

BUTTERFIELD v. FORRESTER, c. 150, 11 East 60, 1809.

Action on the case for obstructing a highway, whereby plff. was thrown from his horse and injured. It appeared that deft. had left pole across part of the road, plenty of room being left to pass by; that if plff. had used due care he wouldhave seen and avoided the pole; that he was riding carelessly at great speed, and ran into the pole. HELD, that he could not recover. Because deft. was at fault is no reason why plff. should not be required to use ordinary care and having failed to use such care he cannot take advantage of deft's fault.

Deft. was negligent and was absent. Had plff. been using ordinary care and been injured, he could have recovered. Here he was not using ordinary care. In fact had he been using ordinary care he would not have been injured, so the negligence of plff. was a prox. cause of his injury. Although deft's act was part of the cause, plff's act was also a part of the cause. Plff. cannot recover when his act

was the sole cause or when it is a part of the proximate cause.

Suppose deft. had been present and plff. absent (his horse running away), then if deft. might have avoided the consequences of plff's negligence and did not, he is liable. Courts often apply the rule that he who had the last chance of avoiding the injury is liable. The court said here that deft's negligence was the sole legal cause of the injury. Apparently they had that rule in mind when they said that.

DAVIES v. MANN, p. 151, 10 Meeson & Welsby 546, 1842.

Case for negligence. Declaration stated that a donkey belonging to plff. was lawfully on the highway; that a wagon of deft. under management of a servant, was so negligently driven as to run over the donkey and kill him. It appeared that the plff. having fettered the fore-feet of the donkey, turned it into the highway. Deft's wagon came down a slight descent at a rapid pace and ran into the animal, driver being some distance behind. Judge charged that even if plff's act was illegal, nevertheless if prox. cause of injury was driver's want of due care, action could be maintained. Verdict for plff. Motion for new trial. HELD, that as deft. might, by proper care, have avoided injuring the animal, he is liable though the animal was improperly there. Plff's negligence will bar his action only when he might, by ordinary care, have avoided consequences of deft's negligence. Rule refused.

Often quoted. Here deft. was present and plff. absent in contrast to Butterfield v. Forrester, ante. Jury here found legal cause was act of deft. and not of plff. Accident might have been avoided by ordinary care on part of plff., but deft. was not in the exercise of ordinary care at the time of accident. Deft. had the last chance to avoid the accident.

STILES v. GRANGY, p. 152, Penn., 1872.

Action on the case for injury caused by negligence of deft's son. Plff's wife tied her horse to a tree, with the carriage projecting into travelled part of the road. While she was gone, a loaded wagon of deft's came along. Deft's son the driver, was behind and the team was coming along alone. It ran into plff's carriage, doing the damage complained of. Judge charged that plff's negligence cannot be set up as an excuse if deft. was also negligent. Verdict for plff. Error. HELD, that it is clear that in case of contributory negligence plff. cannot recover. Judge was wrong therefore in leaving nothing to the jury except deft's negligence. Judgment reversed. Venire denove.

The decision of the court above is like Davies v. Mann. See H.& R. (English) 424, both parties absent here. 8 Harv. Law Review.

Judge charged thatdeft. cannot plead plff's want of care if he was negligent himself. Court held this incorrect.

Suppose negligent collision, one driver asleep, other not, could former recover? Jury would very likely find that latter had last chance to avoid collision so was liable.

The great question is, what occurred at moment of accident, not how the parties got into that position, or how long ago, but merely what was

their relative state at that time.

TUFF v. WARMAN, p. 155, Com. Pleas, 1857, Exchequer Cham., 1858

Action for so negligently navigating a steamer in the Thames as to run against and damage plff's barge. It appeared that the plff. was also negligent in managing his barge without a lookout. Judge charged that if plff's negligence was proximate cause of the injury he could not recover, but if his negligence was only remotely connected with the injury, question was whether deft. by use of due care, might have avoided it. Verdict for plff. Rule nisi. HELD, (in C.P.) that the charge was correct. Appeal. HELD (Ex. Ch.) that the judgment be affirmed. Mere negligence would notbar plff's right, unless it were such that but for his negligence the accident could not have happened; nor if deft. by exercise of due care, might have avoided consequences of plff's negligence.

Celebrated case. Case was probably decided on assumption that deft were aware that plff's boat was not keeping a lookout, and yet notwithstanding such knowledge, defts. did not alter their course so as to avoid collision. Trial Judge said, "Plff. could not recover if plff's negligence was any part of the legal cause," which is right, but he also said, "directly contributed," which is misleading or ambiguous. Court refused to set aside verdict. On appeal court refused, to set aside. Wightman,J. (See bottom of p.159) used the "but for" rule, which is grossly erroneous, because under that rule, if there was negligence of plff. anywhere in chain of antecedents he could not recover. Rule of law laid down to jury at trial was substantially correct, except that it is not best to use word "contributed" or "directly contributed" because of liability to misapprehension. But plff. cannot recover if his negligence was in any degree the cause of the injury. Opinion of Wightman is entirely indefensible. Here both parties were present. See Clerk & Lindsell on Torts p. 881. Pollock on Torts, 2nd Ed. 401-2. Court regarded deft. as having had last chance to avoid the injury. Note criticism of opinion in Murphy v. Deane. See 84 N.W.Rep. 758, Mis., which is contra to Tuff v. W.

The case arose on a motion to act set aside for misdirection. This is the reason why the court only considered whether the instruction was correct and refused to consider whether the verdict was against evidence.

Prof. Smith thinks that this is a case of concurrent simultaneous negligence. If the men in plff's boat had been asleep and deft. had known it, plff. could have recovered. Pollock on Torts 2nd Ed. 401-2. Clerk & Lindsell, p. 881.

The principal case is supportable only on the assumption that deft. knew of plff's negligence and that that imposed a duty of greater care upon deft. to lookout for him. Wightman's rule would permit recovery where plff. had exposed himself to deft's negligence. Wightman's statement on the top of p. 160 is open to the objection made to it by Wells,J. in Murphy v. Deane. As to the second part of his test, namely, that about avoiding the result by deft., either could recover from the other.

See p. 161 about ten lines from the bottom.

There is a great conflict of authority as to whether the burden of proof is on the plff. to show that he was without fault.

Contribute is a very bad word to use for a very little thing might contribute, and still not be a part of the legal cause. The word is too loose and "directly" does not help it much.

MURPHY v. DUANE, p. 160, Mass., 1889.

Held, (by Wells,J.) that the rule in Tuff v. Warman is incorrect. It implies that the burden of proof is not on plff. to take due care on his part, but that he can recover whenever deft's negligence was sufficient of itself to cause the injury. True rule is that plff. cannot recover if by due care he might have avoided consequences of deft's negligence, that is, if his negligence is proximate cause. And the burden is always on plff. to show, either that he was using due care, or that the injury was in no way attributable to his failure to use such care.

There is much conflict of authority as to whom burden of proof is on.

BADLEY v. LONDON & N.W.R.R.Co., p. 163 Law Rep., 1 Appeal Cases 754, 1876.

Action to recover damages for destruction of plff's bridge. The bridge was over a side track belonging to plff. Deft's servants had run some of plff's empty trucks on the siding and left them. I one of them was a broken truck, combined height of two being 11 feet. One of plff's watchmen knew they were there. Next day, deft. ran some more cars on the siding, pushed the car containing broken truck against the bridge, doing the damage complained of. Defence was contributory negligence. Judge charged that jury, in order to find for plff. must be satisfied that he was not guilty of any contributory negligence but that injury happened solely through deft's negligence. Verdict for deft. Rule nisi.

HELD, that judge's charge was too broad and unqualified. While it is true in general that plff. cannot recover if his negligence has contributed, yet there is this qualification, that, even though plff's negligence may have contributed, nevertheless, if deft. could, by use of ordinary care, have avoided the accident, plff's negligence will not excuse him. Judge was wrong in not applying this latter rule to the facts of the case.

Plff. was negligent Saturday and continued so through Sunday. The deft. was negligent Sunday, was present and was in motion. Clerk & Lindsell p. 888 say that the decisive point in this case is that the plff. was passive and the deft. active, so that deft. actually did the damage, was the active cause.

The judge charged practically that if there was any contributory negligence on his part, plff. could not recover. The court held this wrong holding that plff. could recover if deft. could have avoided the consequences of plff's negligence by ordinary care; they go on the principle that there were successive acts of negligence.

The rule of Lord Penzance on p. 185 is a good one for this case, but it is not good as a general rule; for it applies only to acts which are successive. He undertook to lay down the whole law of contributory negligence saying that he who has the last opportunity is liable if he does not avoid the consequence of the other's negligence. Pollock 404-5 This rule evidently won't apply where the negligent acts of plff. and deft. are simultaneous. Neither can recover in cases where either or neither can avoid the injury.

In Matthews v. The London St. Tramway Co. it was held no defence to say that deft. was not guilty of the whole of the legal cause as a third party was concerned. Had plff. been that party he couldn't have recovered. That deft. is not the whole cause of the injury is no defence to a suit by a non-negligent third party, but it is to a suit between the parties concurring in the negligence.

Prof. Smith doubts whether there was in fact negligence on the part of the plffs., but the court thought there was. The jury under the instructions probably thought that they must apply the "out for" rule. The first proposition on p. 85 does not distinguish between cause and condition. That proposition was probably intended to mean that plff. is barred if his negligence is in whole or in part the legal cause of the action. The second proposition is meant for an explanation of what the judge means by legal cause: that if after the negligence of plff. which was earlier deft. had a chance to avoid it by exercise of ordinary care, then deft. is not excused on account of previous negligence of plff., because then deft's negligence is the sole cause. Pollock on Torts 2nd Ed. 404, 405. This is a good rule where case is one of successive negligences, but it will not work where negligences are simultaneous and one is part of cause.

THOMAS v. CUTTERWALL, p. 187, Queen's Bench Div., 1897.

Bowen, L.J. Plff. in an action for negligence must prove two things: 1st, that deft. has been guilty of some negligence; 2nd, that deft's negligence was proximate cause of the injury. Contributory negligence in plff. only means that he himself has contributed to the accident in such a sense as to render deft's breach of duty no longer its proximate cause.

Lord Esher had in mind such a case as Matthews v. The London St. Tramway Co., Lord Justice Bowen had in mind a case like Davies v. Mann.

The term contributory negligence should be confined to cases where plff. and deft. are concurrently negligent. There the acts of both go to make up the legal cause.

It should have been said under Radley v. The London R.R.Co., that that case is generally regarded as having settled the law on the point. Clerk & Lindsell. 888.

NASHUA IRON & STEEL CO. v. NORTH'N & NASHUA R.R.CO., p. 188, N.H., 1888.

Declaration alleged that through deft's negligence, plff's horse was frightened and caused it to injure Ursula Clapp; that she had recov-

ered damages from plff; that defts. had notice of and were requested to defend the suit. Demurrer. HELD, that result of previous suit shows that plff. was negligent, so the question is as to whose negligence was proximate cause. Deft's negligence being found, the question is, whether plff. by exercise of ordinary care could have escaped the injury. It is only in case he could not that he can recover. Presence or absence of the parties makes no difference. To warrant a recovery in any case, ability on part of deft. must concur with non-ability on part of plff. to prevent the injury by ordinary care. Demurrer overruled.

As to contribution between wrongdoers see Keener on Q.C. 408 to 410. 148 Mass. 623. Keener's cases on Q.C. 492 to 504.

The case takes four suppositions as to the presence or absence of parties. The rule of law is the same for all these cases, but the application may vary with the different circumstances. (1) Deft. absent. Plff. can recover if he does not know of the negligence of deft. and is not to blame for not knowing it, but there is a conflict of authority as to how much care he is bound to use to look out forthe negligence of others. (2) Plff. absent. Here the negligence of plff. is not a cause; it merely affords an opportunity to the deft. to do the injury. (3) Both present. If deft. could avoid and plff. could not, deft. is liable. See ship case, p. 175. You must consider the negligence at the time of the injury. Plff's negligence may be the cause of the danger, and deft's cause of the injury. If both are negligent at the time of the injury, any previous negligence does not count.

NEAL v. GILLETT, p. 176, Conn., 1875.

Action to recover for personal injury alleged to have been caused by deft's negligence. Plff. claimed that deft. was guilty of gross negligence and so he was entitled to recover, notwithstanding that there might have been want of ordinary care on his part. HELD, that regardless of whether deft's negligence was slight or gross, plff. cannot recover if his own want of ordinary care contributed essentially to his injury.

This case represents the great weight of authority.

If plff's negligence contributed to the injury in however slight a degree, it bars his recovery, however gross the negligence of deft. may be. This is the general rule. Compare it with the Ills. rule given by Breese,J. on p. 178. The Ills. rule is now repudiated in that state; see 8 Harv. Law Rev. 270 and 358, but it has crept into statutes and crops up under different names in other states.

Breese,J. in Galena, &c. R.Co., v. Jacobs, p. 178, Ills., 1858.

All care or negligence is at best but relative, the absence of the highest possible degree of care showing the presence of some negligence, slight as it may be. The true doctrine therefore is, that in proportion to the negligence of the deft. should be measured the degree of care required of the plff., that is to say, the more gross the negligence manifested by the deft., the less degree of care will be required of the plff. to entitle him to recover. The degree of negligence must

be measured and considered, and whenever it shall appear that the plff's negligence is comparatively slight and that of the deft. gross, he shall not be deprived of his action.

Illinois rule, also called doctrine of comparative negligence. Based on supposition that degrees of negligence exist. 8 Harv. Law Rev. 270, 258. Courts often might have applied in cases where this rule is said by courts to be applied, the principle that plff's negligence was so remote as not to be part of the case in many cases.

Rule in Ga. & Tenn., that plffs. negligence might be considered in mitigation of damages. Florida rule in Rev. Stat. (1892) sec. 2845.

WEST MAX YORRIS, p. 172, U.S., 1890.

Suit in admiralty against the steamer Max Morris. Libellant, employed on board the boat, had a fall, through the negligence of those in charge, whereby he was injured. It appeared that the fall was partly due to his own negligence. HELD, that it is settled in admiralty law that in case of collision between two ships, both negligent, damages shall be equally divided. Justice and public policy require that a similar rule to be followed in all cases of marine tort like the present. Plff's negligence should not bar recovery, unless it is wilful, gross or inexcusable. He is entitled to a decree for divided damages (whether exactly one-half or not, court does not decide.)

The case gives the rule of admiralty courts. In admiralty, where plff's fault was either the whole cause or no part of the cause, the rule cannot differ from common law, but where plff's fault, was only part of the cause, it differs from common law. In admiralty, if each is part of the cause, no matter what part, of cause, each may be, damages are divided equally.

Here plff. could not have recovered anything at common law, as he was negligent himself.

Admiralty courts started with the doctrine that in case of a collision of two vessels, damages should be divided, and extended it to cases of innocent passengers injured in a collision of two vessels, then to the case of a man injured working on board of a vessel, as in this case. Admiralty does not divide damages, where fault is due entirely to one party. In common law, the jury assesses damages, in admiralty the court assesses the damages. This may partly explain the difference of view.

The distinction drawn between negligence and wilful negligence, wanton negligence, etc., in doctrine of contributory negligence ought not to be drawn. 95 Ind. 188-1, very good statement. Also good discussion in 4 Cycl. of La. 80-1, sec. 88.

Three rules, common law rule, admiralty rule, Ills. rule of comparative negligence. In some states statutes have been passed making the damages recoverable proportionable to amount of cause furnished by negligence of other party. 8 Harv. Law Rev. 268.

We are not now considering whether or not a duty is imposed on a man to ant cipate negligence of antcher.

GLINEY v. GOODRUHY, p. 184, N.H., 1885.

Debt to recover double damages sustained by plff. from being

Debt to recover double damages sustained by plff. from being bitten by deft's dog. Action was brought under statute providing that any person injured by a dog shall recover double damages, unless engaged in trespass or other tort at the time. It was uncertain whether plff. used due care or not. Judge charged that on this depended whether or not he could recover. Plff. excepted. HELD, that reasonable construction of the statute shows that doctrine of contributory negligence is not barred out, notwithstanding that the words, taken literally, mean that deft. is absolutely liable unless plff. were committing a tort. The statute is to be interpreted with reference to the general principle of law that a party cannot recover damages for negligence of another if his own negligence contributed.

Court here reads law of contributory negligence into the statute; statute is often to be taken as subject to common law rules. This is a very strong move on part of court. Where statute imposes liability on a man if he fails to do a certain thing, as a general rule courts will understand Legislature meant that he is to be liable only to plffs. who are not guilty of negligence; question on Legislative intention. See Donovan v. R.R.Co.

CLEVELAND ROLLING MILL CO. v. CORRIGAN, p. 187, Ohio, 1899.

Plff. below, an infant under 14, sued the Mill Co. for injuries incurred through latter's negligence. Defence, that injury was caused by boy's negligence. Judge charged that the boy would be held only to such care and prudence as a boy of his age, of ordinary care would use under the circumstances. Verdict for plff. Exceptions. HELD, that though other rules have been favored by some courts, the one expressed by court below is best. Children constitute an exceptional class of persons, and less care is expected of them than of adults. Ordinary care ~~and prudence--are~~ for them is that degree of care which children of the same age, of ordinary care and prudence, are accustomed to exercise under similar circumstances. Judgment affirmed.

Prevailing rule. Makes children a distinct class. A child is held to the same and not to a greater degree of care than is usually exercised by children of the same age.

This case settles the rule where the child is a plff. Probably the same rule would hold in a case where the deft. were a child.

There are three rules possible for children: (1) Care of adults; (2) No care at all; (3) Care, usually exercised by children of the same age as the one in question.

BROWN v. NEW ROCK &c. CO., p. 189, N.Y., 1899.

Action to recover damages for alleged negligence in causing death of plff's intestate, a child of 7 years, 3 or 4 mos. old. Plff. was non-suited on the ground that a child of that age was sui juris, and the act of the child here was contributory negligence. Appeal. HELD, that the question should have been submitted to the jury. It cannot be asserted as matter of law that a child 7 years old is sui juris. There is no fixed period, but is always a question of fact for the jury, the bur-

den first being on plff. to give some evidence that the party injured was not capable of exercising judgment and discretion. If child was chargeable with care, jury should have determined whether she acted with that degree of prudence, which might be reasonably expected, under the circumstances, of a child of her years. Judgment reversed.

It is always a question for the jury as to how much care the child in question ought to have used, still the child may have been so young, in some cases, as to justify a judge in assuming as a matter of fact, that the child was not guilty of contributory negligence, as in 49 Pacific Reporter 222. Here the question was properly submitted to the jury.

In criminal law there is a conclusive rule that a child under seven cannot commit a crime. In torts there is no such rule as to care. The rule is that the child should use such care as an average child of that age would use under the circumstances.

It is not a hardship to leave children outside of the operation of the contributory negligence rule, as that rule was not intended for the benefit of the deft., and deft. is notliable anyway unless he was negligent.

An adult is bound to use such care as an average adult would use under the circumstances, unless a distinct defect or manifest incapacity be shown, for example, blindness. The rule for a blind man would be, the care that a careful, prudent blind man would use under the circumstances. Obviously, that might be more than a man without such defect would use. See Holmes Com. Law 109, 110.

Contributory negligence is as much a bar to an action under a statute as at common law, save where the statute points out an actual liability, for instance, in 82 N.E.Rep. 447, a statute required that shafts be fenced in and provided the damages for an accident where they were not fenced in. Contributory negligence was not allowed as a defence, as the statute was presumed to be intended for the benefit of workmen who were negligent.

Where a child is hurt by the negligence of another four classes of cases may arise: (1) action by the child for his own benefit and defence negligence of child; (2) same action as one, and defence imputed negligence, that is, negligence of parent or guardian, or one standing in the relation of parent, etc.; (3) action by child's friend or parent for child's benefit for loss of service and other rights. Defence, parent's own negligence; (4) same action as in three, and defence that parent is barred by negligence of child.

There is also the case where a child is the plff., is negligent and also a trespasser. These different cases are brought in the cases and lectures.

SPRINGER v. KELLY, c. 191, Indiana, 1920.

Action for assault and battery. Deft. requested that the jury be asked whether fault or negligence of plff. contributed in any way to the injury. Judge refused. Appeal. HELD, that the refusal was right

The doctrine of contributory negligence has no application to the case of an assault and battery, for person so assaulted is under no obligation to avoid the same by care, and his want of care in no sense contributes to the injury. He cannot be deprived of his redress on the ground that he took no care to avoid the invasion of his right.

Contributory negligence is no defence in an action for intentional injury. There is no duty to avoid the results of an other's intentional injury, but one must use due care after being injured. 1 Seagwick on Damages, 8th Ed., sec. 204.

To illustrate, suppose A intentionally wounds B, B sees he is about to be injured and does not avoid it. Afterwards he is negligent in treatment of wound; it increases his injury from $250 to $1,000. B brings suit for personal injuries, A pleads contributory negligence, that B might have avoided all injury. B can recover $250.

Wanton or reckless negligence is a meaningless term and the authorities which allow a negligent plff. to recover for it are not to be supported. By wilful negligence the courts mean, where a man knowingly omits to do his duty in the full consciousness of the consequences. It is not desirable to have this middle ground. 95 Ind. 288 and 294 contains a careful statement of the middle ground. See also on middle ground Am. & Eng. Encycl. of Law Vol. 4, p. 80-1, par. 88.

Plff's contributory negligence must be in whole or in part the legal cause of the damage, but just what the legal cause is is a different point, and when it is once settled, it does away with all difficulties of contributory negligence. Contributory negligence only arises in cases where the legal cause is a compound of acts of plff. and deft.

A rule is coming in by statute in some states that plff. may recover in proportion to his negligence, the less the negligence the more the recovery. The difficulty of this rule is in apportioning the damages. The penal theory of explaining contributory negligence, namely, that plff is guilty and so must be punished has an element of truth in it. 9 Harv. Law Rev. 288, article by Schofield. The idea is to induce people to live up to the law; the punishment for not doing so is loss of their right of action.

KEUM v. ANTHONY, p. 194, Penn., 1888.

Case for death of a horse alleged to have been caused by negligence of deft. in not keeping in repair a fence whereby plff's horse escaped and was injured. Plff. claimed that there was an agreement whereby deft. was to keep the fence in repair. Plff knew the fence was down, when he put his horse out to pasture at night. Judge charged that deft. was liable if he failed in his duty to keep up the fence, and refused to charge with regard to plff's contributory negligence. HELD, that this was error. Action was not for breach of contract, but was an action of tort to recover damages for a loss caused by deft's negligence. Negligence being gist of the action, contributory negligence will bar recovery. Plff. should have sued for the neglect to fence, it being a breach of duty and the court logically would have had to let him recover.

Doubtful if the defence of contributory negligence should be allowed where there has been a breach of contract.

The case is contra to Kellogg v. The Railroad.

In Donovan v. R.R. deft. was bound to keep fence by statute; here, deft. was bound to keep fence by contract. That was case of a statute and this was a case of private contract.

DONOVAN v. HANNIBAL & ST. JOSEPH R.R.CO., p. 198, Missouri, '88.

Action for double damages under statute requiring Rs. to maintain fences along the line where it passes through enclosed land, and providing that they shall be liable for double the damage done to animals through failure to comply. It appeared that deft. negligently delayed in building such a fence by plff's land. Plff. finally turned cattle into the field and owing to absence of fence they strayed on track and were injured. Deft. offered no evidence but requested court to charge that if plff. put his cattle into the pasture knowing that there was no fence, he was guilty of contributory negligence and could not recover. Deft. answered plff's charges only by a general denial. HELD, that the charge was properly refused, as contributory negligence was not pleaded. Further the charge requested is bad because it did not leave question of negligence to jury. Further plff. had a right to pasture his cattle there, which he could not be deprived of by deft's failure in its duty, even though aware of its failure.

The Legislature had in mind passengers also. We are to look at nature of act prohibited and reason why prohibited. What do the words mean when usedin this particular statute? And for this particular purpose? To read doctrine of contributory negligence into this statute would make the statute nugatory. 29 Mich. 517,-18. Use of land by its owner is regarded as so important that owner is less restricted than in use of his chattels. Legislature intended precisely that the owner should not be deprived of the use of his land. See Krum v. Anthony, post. Authorities are with Donovan v. R.R. Here, plff. knew perfectly well that deft. had not complied with the law.

KELLOGG v. CHICAGO & N.W.R.R.CO., p. 199, Wis., 1870.

Action to recover damages for destruction of stables, etc., by a fire alleged to have originated in neglect of deft. Fire was communicated by sparks from engine to dry grass which had been allowed to accumulate on deft's land and thence passed to similar grass on plff's land (allowed to accumulate according to custom among the farmers); a strong wind aiding it until it reached the building in question. Verdict for plff. Appeal. HELD, that the instructions of court below, leaving it to jury to say whether deft. was negligent in leaving dry grass there, was undoubtedly correct; also refusal of court below to charge that plff's leaving dry grass on his land was contributory negligence, was proper. Doctrine of contributory negligence does not apply. Plff. was not obliged to abandon the ordinary and proper way of using his land, simply in order to avoid possible consequences of deft's negligence

35 N.W.Rep. 295 (297-8), plff. owned hay a mile away from deft's

stack. Deft. negligently set fire to his stack. Pliff. saw the fire, thought it would reach his hay but took no precautions. Court held that if pliff. by due care could have saved his hay, he could not recover. How distinguish that case from Kellogg v. R.R.? A distinction is drawn between present and immediate danger and possible or probable only.

The principal case is right, but there is a conflict of authority on the point. Prof. Smith thinks it is right. Also that Loker v. Damon is right. A man cannot by his own negligence impose upon another the duty of abandoning the use of his own property, but after a danger is set in motion by the deft., the pliff. is bound to do all he can to avoid its effect, as in the case of fire. Hogle v. the R.R. and Loker v. Damon.

A railroad uses a dangerous agent on its premises and must provide proper safeguards against the danger and damage created by its own act. The adjacent land owner as in Kellogg v. R.R. is doing nothing of that kind and is not bound to provide safeguards against probable future harm. It is enough to hold him bound to try to avoid damage after the damage has been begun. He may make all beneficial use of his land although the R.R.Co. is using a very dangerous agent on its premises; no duty for him to refrain on that account.

ON CONTRIBUTORY NEGLIGENCE IN GENERAL.

Where there is a compound legal cause made up in part by negligence of pliff. and in part by that of deft., is the only case where the doctrine of contributory negligence comes in. Contributory negligence had better be confined to cases where the legal cause is a compound of pliff's and deft's negligences. Contributory negligence is simply a branch of doctrine of causation. 51 L.R.A. 885,889.

Pliff's negligence need not be sole cause; enough to bar recovery, if it is part of the legal cause. Beven, 1st Ed. 135, 137, criticises "Contributory". When a third person has been injured by accident brought on by negligence of two persons, court allowed recovery from him whose negligence began to operate first, and who was not present at the time and had no opportunity to avoid the accident at the time. When suit is between the actual parties court will rather consider doctrine of last chance to avoid the injury.

Prevailing view is that of Neal v. Gillett, ante 174. Possible theories: (1) Pliff. is barred if substantial fault of pliff. is found anywhere in a chain of antecedents; "but for" rule. (2) Illinois Doctrine. (3) Florida view that the previous negligence of pliff. would be considered in mitigation of damages only. (4) Doctrine of Admiralty, dividing the damages equally. (5) (Query) If pliff's prior fault is in a moral point of view worse than deft's subsequent fault, pliff. cannot recover; probably no court has adopted this last, although decisions may often have been unconsciously influenced by it.

Impossibility of equitable apportionment of damages between the parties in a common law action is one reason for adopting theory in Neal v. Gillett. Admiralty rule is called justitia rusticorum. Common law courts do not care to adopt admiralty rule dividing the damages equally

because sympathies of jury might be with plff. who was in fault. Neal v. G. rule is sometimes called the "Penal" theory; better be called Preventative rule. See Schofield in 8 Harv. Law Rev. 270: "Ultimate justification of rule is in reasons of public policy, viz., desire to prevent accidents by inducing each member of community to act up to the due care required by law." To say that plff. is barred where he is a wrongdoer is not a correct use of word "wrongdoer." In many cases plff. by his own want of care, although he cannot sue, neither is he liable to be sued. His contrioutory negligence does not always imply a wrong on plff's part which makes him liable to be mulcted in damages. 2 Jag. on T., p. 980. Pollock, 2nd Ed., 180.

Plea of contributory negligence admits deft's breach of duty towards plff. but alleges that plff. is barred by his own concurrent negligence. Defence of consent is no admission of breach of duty on part of deft. toward plff.

Read carefully opinion in Nashua Co. case, ante 188 of the Cases.

CHAPTER IV.

IMPUTED NEGLIGENCE.

This heading might perhaps better be imputed contributory negligence. Imputed negligence is a subject on which there is a conflict of authority.

THE BERNINA, Court of Appeal, 1887.

Three actions brought against owners of steamer Bernina by representatives of three persons killed in a collision between that vessel and another, both being negligently navigated. One of the persons was a passenger, another was an engineer, not responsible for accident, third was second officer, himself to blame for the collision. Lower court held plffs. could not recover, on authority of Thorogood v. Bryan. Appeal. HELD, that owing to contrioutory negligence on part of second officer, his representatives cannot recover. As to others, question turns on whether negligence of those in charge of their boat is to be imputed to them so as to defeat recovery. It is not. Thorogood v. Bryan was wrongfully decided. Neglect of omnibus driver or steamboat officer cannot be imputed to passenger. Where latter is injured by combined negligence of the person in charge of the conveyance he is in, and the one in charge of another conveyance, he can recover against either or both. Theory of identification of passenger with negligent driver is a fallacy and a fiction, contrary to sound law.

This case is called Mills v. Armstrong in the House of Lords.

Thorogood v. Bryan was law in England for 40 years. It is overruled by the Bernina case. It was rejected in the U.S. soon after its decision and is now generally rejected.

In the principal case, the engineer could not sue his employer for negligence of his fellow servants, but he could recover from either of the joint wrong doing fellow servants and from the other vessel. If these wrongdoers were conscious of their guilt, neither of them could recover contribution from the others. 116 U.S. 366 follows the Bernina.

There the negligence of a hack driver was not imputed to the passenger. It is the leading case on the subject. The passenger there had no control of the driver.

Suppose a friend takes you out to drive, is his negligence to be imputed to you? No. A wife would probably be barred, but the view is growing that the husband and wife are not one in law and probably in some jurisdictions the wife could recover.

If a passenger gives directions which are followed by the driver the passenger would probably be barred by his own negligence. So if he is sitting beside the driver and does not warn him of a danger which the driver does nkt see, he is barred.

A person who is riding in a public conveyance is not bound to enquire into the antecedents of the driver, but if he started out with a driver intoxicated and manifestly unfit to drive, he would be barred by his own negligence and not by any doctrine of imputed negligence. In fact the doctrine of imputed negligence is now exploded, but personal negligence is still a bar.

In 21 S.C.Rep. 274, two persons were engaged in a joint undertaking. One was driving a wagon and the other sitting in the rear leading a horse. Owing to the negligence of the driver and a third party, the one in the rear, a blind man, was injured. HELD, that the blind man cannot recover. If two persons are engaged in a joint undertaking, each is responsible for the negligence of the other; they are agents of each other.

In the Bernina the engineer was not a principal; he and the second officer were only fellow servants, not principals at all. The negligence of a servant when engaged in the business of a master is imputable to the master.

If a man sends a box by a freight train on the F. railroad and there is a collision with the B.& M., both railroads being negligent, can he sue the B.& M., or is he barred by the negligence of the F. railroad, or of its agents? 22 N.Y. 470 at 482 and 488. HELD, that he is barred, though if he had been a passenger suing for personal injuries, he would not be barred. 27 Atl. Rep. 1111. This rule will probably be followed generally. The reason why the passenger could sue is that there is no bailment.

[illegible] v. PHILLIPSBURG [illegible] CO., p. 215, N.J., 1890.

Plff. was a child two years old, in the custody of her sister who was 22. Left alone for a few minutes, the child got in the way of one of deft's cars and was injured through negligence of driver. Question was whether neglect of person in charge of plff. should be imputed to plff. so as to prevent recovery. HELD, that it should not. Person in charge is not infant's agent, and so infant is not responsible for his misfeasance. A very young infant cannot be charged with negligence himself, much less by substitution. Being in no sense the blamable cause of his injury, he can recover in a case like this.

A child of two years cannot appoint an agent. The only reason why one is barred by an agent's negligence is because he appoints the agent,

out in the case of an infant, the law appoints the agent or guardian to protect him, and not to injure him, so the child ought not to be affected by the negligence of the parent or guardian, or other person standing in the relation of parent. But to hold this there is no need of going into any doctrine of imputed negligence. The case can be decided on the authority of Davies v. Mann.

HARTFIELD v. ROPER referred to on p. 212 of the Cases is still law in New York and somewhat in Mass. The argument for that case is that the father could not recover for the result of his own negligence. But in legal theory the money belongs to the child, and will be used for the benefit of the child, although in fact, the father generally gets the benefit of it. On theory the Newman case is right and Hartfield v. Roper is wrong, but the point is in conflict.

BELLEFONTAINE & I. R.R.CO. v. HYNES, p. 212, Ohio, 1868.

Welch,J. The reasons for the doctrine of contributory negligence do not apply in the case of infants. The infant has not been guilty of any wrong himself, and it is not just to make his personal rights dependent on good or bad conduct of others. Can it be true that if only one person offends against an infant, latter has his action, but that if two so offend, their faults neutralize each other, and he is without remedy? He should have action against both.

GLASSEY v. HESTONVILLE &c. R.R.Co., p. 212, Penn. 1868.

Action to recover for loss of son's services through his being hurt by a car of deft's. The son was four years old and was alone in the street at the time of the injury. Deft. requested court to charge that knowingly to allow a child of that age to wander alone in the street is such negligence in parent as will prevent him from recovering in a case like this. Court refused. Verdict for plff. Error. Held, that where a parent by negligence contributes to loss of child's services, he cannot recover from the other wrongdoer. Plff's. allowing child to go about alone was breach of parental duty, and as such, negligence in law. Hence he cannot recover and charge requested should have been given.

In the Newman case the action is by the child for his own benefit; here the action is by the parent for the loss of service. Both actions can generally be brought. The Newman case held that if the child is negligent the child is not barred, but in this case that the father's negligence will bar the father's action for his own benefit. The doctrine of Glassey v. R.R.Co. is well settled. The Newman case and Tyrore v. Nahasha Co. are disputed. The instruction in the principal case should have added "that the situation of child must be regarded in whole or in part as the legal cause of the accident." 7 Cent. Law Journal, 218; J.H.& S. on Negligence sec. 72, n. 2; Beach on Negligence 2nd Ed., sec. 182 to 185.

The weight of authority is that a parent is barred by the negligence of the child. 59 Fed. Rep. 422, 65 Fed. Rep. 29. The latter case held that the parent was barred when the child was so far negligent that he could not maintain an action for himself.

The child is not identified with the father, the father is not liable for his torts, and recovery goes in theory for the benefit of the child, so there is really no reason why the child is barred by the parent's negligence, but he is generally.

WYMORE v. NAHASKA COUNTY, p.218. Iowa. 1889.

Action to recover damages for death of plff's intestate, alleged to have been caused by deft's negligence. Judgment for deft. Appeal. It appeared that Henry Smith and his family, including intestate, then 2 years old, attempted to drive over a bridge of deft's. It fell through while the carriage was on it and the child was killed. There was contributory negligence. HELD, that negligence of parent is not imputable to child. The child was free from fault, and the mere fact of negligence on the part of his parents, should not bar an action brought for benefit of his estate. Recovery may result in an undeserved benefit to parents as they inherit child's estate, but that fact cannot defeat the action brought in the right of the child.

Action on statute by administrator, but proceeds are going to parent Conflict of authority as to whether parent's negligence should be a bar when he is sole beneficiary. It would not bar when there are several beneficiaries and only one is guilty of contributory negligence. At common law, there was no action for causing death. The action is by statute. The question is what the legislature meant by the statute. Had it meant to bar a sole beneficiary, it would probably have said so. The point is in dispute. Tiffany on "Death by Wrongful Act," secs. 69, 71, pp. 272-4.

CHAPTER VI.

Whether negligence of maker or vendor of chattel may make him liable to persons other than those contracting with him.

WINTERBOTTOM v. WRIGHT, p. 280, 10 Meeson & Welsby, 109, 1842.

Declaration stated that deft. was a contractor for supply of mail coaches, and in that capacity contracted with Postmaster General to supply one, and to keep it in safe and secure condition during the contract; that one Atkinson was under contract with Postmaster General to convey said coach over its route; that he hired plff. as driver. Declaration then alleged that deft. so negligently conducted himself that the coach became unsafe, whereby an accident happened and plff. was injured. HELD, that plff. not being privy to the contract, could not recover. Deft. had to deal only with him whom he contracted with. Toward him he owed a duty, but none toward plff. It is damnum absque injuria.

Leading case. Plff. complains that deft. failed to keep coach in repair. Proper construction of declaration would be that plff. counted simply on a breach of contract; there was no allegation of general duty of deft. Yet deft. knew that stage coach was to be driven by a coach driver, one of the class to which plff. belonged. Decision that this declaration is not good is probably correct, but it seems as if declaration could be formed on facts which would be good. Tendency of court here to hold that facts which constitute a contract cannot have any other effect whatever, which is probably not true; it can be the starting point

of some other legal duty. Case important for its dicta. Pollock on Torts, 2nd Ed. 448, 447, 449. H.Smith on Neg. 2nd Eng. Ed. p. 7. 1 Sher. & Red. on Neg. 114. Bigelow's Leading Cases on Torts, p. 814, 819.

THORGOOD and WIFE v. SKIVINGTON, p. 224, Exchequer, 1869.

Action brought by plff's wife against a chemist. Latter sold plff. a compound he represented as a hair wash, knowing it was for his wife. Owing to negligence of chemist she was injured, the compound not being fit for a hair wash. HELD, that she could recover. The action is not upon the contract, but for breach of the duty which deft. owed, not only to purchasers, but to the persons he knew the mixture was intended for, to use ordinary care in compounding it. Judgment for plff.

This is practically the wife's suit. So a third party, not a party to the contract, is allowed to recover. The court did not overrule Winterbottom v. Wright, but limited it so that a person who is particularly named at the time as the person who is to use the article bought, could recover for any damage done in its use. The court stopped at an illogical point; instead of stopping at the point at which they did, they ought to have extended the liability of deft. to all of that class who might reasonably be expected to use the article. The case goes not on warranty nor fraud, but on negligence. The gist of the action is negligence and misrepresentation. Deft. was certainly guilty of a misrepresentation as well as of negligence.

Prof. Smith thinks the dicta in Winterbottom v. Wright wrong, and the decision in the principal case correct. But the grounds of the decision are erroneous. The court should have allowed anyone to recover who might reasonably be expected to use the article not merely persons mentioned.

THOMAS AND WIFE v. WINCHESTER, p. 297, New York, 1852.

Action for injuries sustained by Mrs. Thomas from effects of belladonna taken by her by mistake as extract of dandelion. Through negligence of deft., a manufacturer of medicines, belladonna a very dangerous poison, was put in a jar labelled dandelion and sold to druggist, who sold it to another, who sold it to plff. Plff's wife took some of it and was seriously injured. Deft. contended action could not be maintained as there was no privity between him and plff. HELD, that natural consequences of deft's negligence was death or great bodily harm to some person. It was a breach of a duty he owed, not merely to his immediate vendee, but to the final purchaser who bought the article for use. As his negligence was imminently dangerous to human life, his liability extends beyond those with whom he contracted.

This is a celebrated case. The jury found that Wood, the druggist who sold from the jar a portion of its contents to one of the plffs. was not negligent. The Chief Justice put the decision on the ground of the great danger of the article to human life. The quality of the drug in this respect ought to make a difference in deciding whether deft. is negligent, but not in deciding the class of persons who may recover.

The court seemed to go on the idea that the dangerous quality of the drug increased the scope of the liability, but there is no logical difference between selling it to retail dealers and sending it out by agents with the same representation. See Clerk & Lindsell on Torts 365 to 368. The courts say in substance that the liability of deft. extends or contracts according as the drug is more or less dangerous to human life. Suppose the manufacturer loaned the bottle as a kindness to one party and he loaned it to another. The latter could not sue the manufacturer, he would not be one of the class expected to use it. The liability in the principal case would be the same if the medicine had been given as a gift by the manufacturer.

Suppose you find a bottle and take a dose, relying on label, can you sue makers for injury? Probably the question would be, was it reasonable to rely on the label under the circumstances? Probably jury would find that it was not.

Sale or gift to A, loan to B, B ought to be held to be one of the class expected to take it. Loan to A, by him loaned to B, latter not one of the class.

Whether intervening negligence would break causal connection depends probably on whether deft. ought to have foreseen it as probable.

BLOOD BALM CO. v. COOPER, 221, Ga., 1899.

Action by Cooper against Blood Balm Co. for an injury caused by taking some of their patent medicine according to their prescription. It was found that the medicine contained a poison sufficient to cause the injury. Deft. claimed a non-suit, (1) because the drug was sold to plff. not by deft., but by a druggist; (2) because the drug was not imminently dangerous. Held, that sale by intermediate person made no difference as long as medicine was made by deft. and taken according to his directions. Manufacturer of the medicine liable to all who take it according to his directions and are injured. The directions accompanying the medicine make it dangerous and proprietor's wrong lies in this, though drug of itself is not imminently dangerous.

The proprietors intended the purchasers to rely on his recommendation. The case differs from Thomas v. Winchester in that it was not a deadly poison, but the medicine contained ingredients which were likely to do harm if taken in the quantity prescribed on the label. The plff. was not an original vendee, but was not so far removed from deft. here as in Thomas v. Winchester. The case goes far beyond the case of Winterbottom v. Wright or Geo. v. Skivington or even Thomas v. Winchester. In fact it goes the farthest of any Am. case but Prof. Smith thinks it goes none too far.

SCHUBERT v. J.R.CLARK CO., p. 254, Minn. 1899.

Action to recover for personal injuries. Plff. was a house painter in employ of one Phelps. Latter ordered a step ladder of a merchant who procured deft. a manufacturer of such articles, to deliver one to plff. It was made of very poor wood and was dangerous to use. Alleged that deft. knew, or ought to have known of these defects, but the

others did not and could not have discovered them. Kadder Ladder broke and plff. was injured. HELD, that though there was no contract relation between the parties, deft's neglect to disclose the defects in the ladder was a wrong to plff. Fact that it passed through intermediate hands makes n, difference, so long as defect was known only to maker. Latter, in putting the ladder up for sale, was guilty of neglect toward the customer who should purchase it, and for injuries caused by that negligence he is liable.

This case is like Geo. v. Skivinton, in that deft. knew that plff. was to use the ladder, for deft. was told to deliver it to plff. But the reasoning of the court goes far beyond the case of George v. Skivington. Deft. knew that the ladder was defective when he put it in stock, although he could not distinguish it afterwards. It was negligence to put such a ladder in stock. This case would be decided the same way had the ladder passed through several hands.

CURTIN v. COMPANY, p. 239, Penn., 1891.

Deft. entered into a contract with a hotel Co., for erection of a hotel. The building was completed and accepted by the Co., and at an entertainment given by the proprietor later, a crowd being on the porch, it broke through, from defective construction, and plff. was injured. It appeared that the porch was not built according to contract, but the defects were not apparent, nor were they known to the Co. Deft. requested court to charge that accident happening after acceptance by the Co., he was not liable. Court refused. Verdict for plff. HELD, that deft. owed a duty to his employer only, none to the public. Different from case of putting a deadly poison in circulation. Judgment reversed.

Tends strongly to sustain English decisions. This case follows Winterbottom v. Wright. Winterbottom v. Wright is also followed in 51 N.Y. 491.

See full report as to evidence of negligence, which however, was not considered by court above. Court held that deft. owed duty simply to man with whom he contracted. Court presumed that defects were not easily observable. As to remark on top of p. 242, deft. did not owe duty to the whole world, but such duty would be only to such class of persons as would probably use the hotel. The claim is that the deft. should use due care and is not, as court seems to think, that deft. should be an insurer. Dangerous things may be lawfully made, kept, and sometimes sold, if they are kept or sold with full notice or warning. 42 N.Y. 351. Weight of authority is very strong that citizen cannot sue water company for failing to furnish water with which to put out a fire, in case of contract between city and company, 22 L.R.A. 277; 18 Pac. R. 89; contra, 18 L.R.A. Rep. 554, 557. But if Co. undertake to perform contract and in so doing they furnish something which is used by the proper class, and which is harmful, as in the case of furnishing impure water, they are liable. In 45 Pac. Rep. 328, court held that where vendor knew of defect, one who has contract relations with vendee, but not as vendor, can recover, 28 Atl. Rep. 301 (Md.); the vendor sold a horse fraudently

representing him to be sound, in fact the horse had glanders, which was communicated to the vendee's hostler; the hostler brought suit against the vendor. The hcourt held that he could recover if his catching the disease was a probable consequence of the vendor's acts.

In 78 Me. 508 a horsedealer falsely represented an animal a safe family horse. The horse was in fact dangerous and ran away with the purchaser. The wife brought suit for injury. HELD, she could not recover. There were no false representations to her. The case differs from Winterbottom v. Wright where it was a case of mere negligence, whereas this was a case of wilful deceit. This case shows the tendency of courts to limit liability to the immediate parties to the contract.

HEAVEN v. PENDER, p. 242, Queen's Bench. 1883.

Action to recover damages for injuries caused by negligence of deft-Plff. was a workman in the employ of Gray, a ship painter. Gray contracted with the owner to paint a ship in deft's dock. Deft. under contract with ship owner, supplied a staging to be hung on the outside of the ship for purpose of painting her. The ropes were defective and unfit for use, deft. did not employ due care in providing them they broke and plf. was injured. Judgment for deft. in Q.B. Appeal. HELD, that plff. could recover, as deft. must be considered as having invited him to use the dock and appliances, and hence was under obligation to use due care to see that the appliances were fit to be used. Brett,M.R. put his judgment on the broad ground that whenever a person is placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that if he did not use ordinary care he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care to avoid the danger. Such a position deft. here was placed in with regard to the class of persons who might be expected to use the staging before a reasonable opportunity for discovering the defect.

As decided by majority of the court this case related to invited persons. Invited persons means persons present by the consent of the dock owners, on business of common interest to himself and the dock owner. Brett uses the word injury on page 244 in the sense of substantial damage. Brett's dictum must be limited so as not to include cases of the ordinary and natural use of land. A man in the use of his own land may frequently do acts which cause substantial damage to his neighbor and the neighbor may do the same in turn with him, but the law will not give any action. Clerk & Lindsell on Torts on p. 881, note A. The maxim damnum absque injuria, damage without invasion of plff's rights, was forgotten by Brett. Even on p. 85 critizes Brett as begging the question, for the word injury correctly used assumes a legal duty. If Brett meant damage, it should be remembered that damage is frequent without a legal wrong. 100 U.S. 185; L.R. 1898 caused a great deal of talk.

In L.R. 24 Q.B.D. 658, thistles on a man's land were carried by the wind on to his neighbor's land, the court held he could not recover. If Brett's statement of the law, bottom of p. 244, were taken broadly he could recover. Brett's statement must be limited as before said to or-

dinary and natural use of land.

In 100 U.S. 105 an attorney looks up title for client, thinks he finds a clear title, gives client certificate to that effect, latter borrows money on strength of it, title is in fact not good. Later onl the lender brings an action for negligence. HELD, he can't recover.

Smith thinks that Blood Balm Co. v. Cooper is right and the dicta in Intercotton v. Wright is wrong, but the weight of authority is agains him.

According to Prof. Smith plff. must prove the following six propositions in order to recover.

(1). The deft. sent article out with a negligent misrepresentation as to its fitness.

(2). The plff. used the article, relying on this misrepresentation, and suffered damage.

(3). That plff. acted reasonably in so relying.

(4). Probably already included under 2 and 3. That plff. used the article in a manner and for a purpose intended by deft., or which deft. ought to have contemplated as probable.

(5). That plff., even though not specifically in deft's mind when he sold the article, was one of the class of persons by whom deft. intended the article to be used, or one of the class of persons whom deft. ought to have contemplated as likely to use it.

(6). That there was no intervening negligence of third persons (or contributory negligence of plff.) breaking the causal connection between deft's negligence and plff's damage.

Where defence is set up that plff. put confidence in sub-vendee, and not in original vendor, that defence is not good - it is not necessary that plff. should put confidence in that particular vendor, but puts his confidence in class of makers who sell that article.

The argument in favor of English authorities is that otherwise deft. may be brought into relations with persons with whom he would not desire to come into contact as where original vendee sells article to some enemy of original vendor. If there have been many changes in ownership plff. would find it difficult to convince jury that some intervening cause had not come in. As to multiplicity of actions, see Innes on Torts, p. 107, 108, note.

The weight of authority is strongly against the fifth proposition above, but set Clerk & Lindsell, 488.

Compare above propositions with the following extract from the opinion of Brett, M.R., in Heaven v. Pender, L.R. 11, Q.B.Div. p. 509. "Whenever one person is by circumstances placed in such position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger."

CHAPTER VII.

DUTY OF CARE ON THE PART OF OCCUPIER OF LAND OR BUILDINGS.

SECTION I.

Duty of care toward persons using adjacent public way.

HARNES v. HARD, p. 250, 8 Common Bench (Manning, Granger & Scott) 892, 1850.

Action on the case under statute for compensating families of persons killed by accident. Declaration alleged that on deft's premises, abutting on the highway, was a large hole, which was insufficiently guarded and so dangerous to passers-by, by reason of which insufficient guarding, deceased slipped and fell in. Plea, that deft. owed no duty to fence in the hole. It appeared that deceased, walking along the highway in the evening, fell into open area of an unfinished house of deft's. Judge charged that if there was a public way so near the area that it would be dangerous to the public unless fenced, then deft. would be liable if deceased was using due care. Verdict for plff. Rule nisi HELD, that this charge was correct. Deft. was guilty of a public nuisance, even though the highway itself was not interfered with, for the danger would prevent full enjoyment by the public. Declaration discloses a good cause of action.

The fault of deft. was not in making the excavation, but in leaving it unprotected. It was close to his line and adjoining a highway. Had it merely joined a neighbor's land, and had there been no fence, neighbor could probably not recover. Deft. could rightfully dig the hole in his land, but it was dug in a place where it was likely that some one would fall in, and it was left unguarded. It was inconsistnt with the public right to use the highway. 4 H. & N. 67 was a case of an excavation about 5 yards from the line of deft's land. Plff. could not recover, the court holding that the excavation must be so near as to cause an appreciable danger that persons passing along the highway and using ordinary care might stray into it. 50 Conn. 585 held that the test is not the number of feet distant, but it is a question for the jury whether the excavation is so near the highway that it substantially endangers travellers who are using reasonable care. Prof. Smith thinks that this is the correct test.

In Mass. the injured party must seek his remedy against the town, this is by statute, so there is no recovery against the individual. 10 Metcalf 271; 149 Mass. 450.

SECTION II.

Duty of Care toward Trespasser.

LUBY v. CLEVELAND, &c. R.R. Co., p. 581, Indiana, 1891.

ACTION FOR DAMAGES ALLEGED TO HAVE BEEN CAUSED THROUGH NEGLIGENT failure of defts. to repair a building on its grounds. The building in question stood on deft's land near the highway in a state of disrepair. Plff. sought shelter there from a rain storm, and was injured from a piece of the roof falling in on him. HELD, that as plff. was a trespasser he took the risk upon himself of all the mere omissions of

deft's. as to the condition of grounds and buildings. Defts., not having invited him there, owed him no duty to keep the building in repair.

Plff. was a trespasser and deft. owed him no duty to keep the premises in a safe condition for him.

See Bishop's Non-Con. Law, sec. 105 as to shooting a trespasser - right conflicts with right; higher right of trespasser to life prevails. Court here seems to take it for granted that plff. had not reached highway. To hold against the decision in this case would amount to this - it would be a duty of deft. to keep his property in repair for the sake of trespassers. Distinguish carefully between harm which happens to a trespasser from the nature of the property on which he trespasses and that which happens from some act of the owner as distinguished from the condition of his property. Where deft. knew that his property was in ruinous condition and did not warn trespasser from going upon it, courts hold that there is no duty of warning due trespasser, even though the danger is not open to the eye, and deft. sees the trespasser. Clerk & Lindsell, 878, n.

The rule is plff. cannot recover for any fault of the premises at the time of the entry. But if deft. intentionally put the premises into a condition to injure trespassers, plff. could probably recover. That is not a justifiable method of deterring trespassers.

Probably the land owner is under a duty not to change things after the trespasser is on his land so as to make it more dangerous.

LOUISVILLE & N.R.CO. v. BOLT, 6. 257, Ky., 1899.

Action against R.R.Co. for injury alleged to have been caused by company's neglect in running its train. Plff., a boy of 11, climbed on a freight car. An engine, with cars attached, ran against it so hard that plff. fell off and the wheels ran over his leg. HELD, that if plff went on the car without knowledge or consent of deft. or any of the employes and was injured, he cannot recover unless employes knew of his perilous position and failed to use due care to prevent the injury.

Deft. did not know and was not to blame for not knowing that the boy was there. In 97 S.W.Rep. 992, Ky. 1894, passenger cars were left near the station and a boy was hurt in some way. The same court held that defts. ewere liable as under the circumstances, there was more probability of trespassers being there.

If deft. knows that trespasser is on land he is under some obligation towards trespasser, but question is, how much? As to this question there are three views. 1. Owner is not liable for anything short of intentional harm. 2. Owner is liable for reckless or wanton conduct or gross negligence. 3. Owner liable for failure to use ordinary care towards trespasser.

WHITE v. MITCHELL, 6. 259, Vermont, 1859.

Action on the case to recover damages which plff. sustained by falling of a staging erected for his own use, caused by deft. having removed one of the staging poles. It appeared that the pole belonged to deft., plff. having taken it for use in the staging without permission; that

deft. removed it in plff's absence and without his knowledge; that the accident resulted as a consequence. Question was whether deft. should have used due diligence to give plff. notice. HELD, that no such duty was imposed on him. His right to remove the pole was absolute. Plff. was unlawfully in possession and had no right to use of pole. It was his own misfortune if he failed to see that the staging was unsafe.

This was a case of reception of a chattel from another's land. The court said there was no duty on the part of deft. to warn plff. of the removal of the support. The case is irreconcilable with Phillips v. Filpers. Deft's act was an affirmative and not a negative one and Phillips v. Filpers is probably better law for affirmative acts than the principal case. But the point would probably be decided differently in different jurisdictions.

If a trespasser takes a dangerous horse and the owner sees him and fails to give warning, the owner is not liable. If the owner knew that a peculiar whistle would make the horse rear up and whistled, and the trespasser was injured, the owner would be liable. Which of these two cases is White v. Mitchell more like?

PHILLIPS v. FILPERS, p. 182, New York, 1882.

Action on the case to recover damages.

Plff., a painter, fastened one of the ropes of his scaffold to the chimney of deft's house, adjoining the one he was painting. Plff. in this action offered evidence to show that deft. untied the rope. Contended for deft. that he had a right to do so as the rope was tied to the chimney without his permission. Non-suit. Appeal. HELD, that that right must be exercised in such a manner as not to betray a reckless disregard of the safety of others. Deft. was bound to exercise reasonable prudence, and to do the work in such a way as to give notice to those who could be affected. Otherwise an act, which might be lawful would become unlawful.

The deft. here loosened the rope in such a way that it amounted to setting a trap for trespasser. He ought to have loosened it in such a way as to make clear to the trespasser what was done or notify him of its being loosened. This is a case where a wrongdoer, by his wrong, imposes a greater duty upon another than would otherwise rest upon him. Prof. Smith agrees with this case rather than the preceding one.

HAYWARD v. BOSTON & MAINE R.R., p. 282, Mass., 1874.

Suit for killing of a horse by locomotive. Admitted that the horse was trespassing on the track. Judge charged that deft. was liable if by due care the injury could have been avoided. HELD, that this was wrong, it being a statement of duty toward a horse rightfully on the track. But as the horse was a trespasser, deft. was not liable for anything short of reckless and wanton misconduct.

It is to be presumed that deft. saw horse; court held him liable only if he was reckless or wanton after he saw horse.

PALMER v. NORTHERN Pac. R.R.Co., p. 285, Minn., 1887.

Action for running upon and killing plff's horse. The horse was

straying wrongfully in the highway, and ran upon the track at a crossing, in front of the train. Deft. requested court to charge that plff. cannot recover unless it appear that deft's servants were negligent after discovering the peril of the horse. Court refused. Appeal. HELD, that the charge should have been given. Horse being wrongfully in the highway, deft's srv/servants were not bound to look out for it before they saw it. When they perceived the animal's danger, a duty arose toward plff., and not until then. If they failed in that duty of care, they are liable, otherwise not.

The horse was trespassing on the highway. The court held that deft was not bound to anticipate that trespassing animals would be there, and therefore would be under no duty to look out for such animals, but deft's duty was merely not to injure the horse after seeing it, if it could avoiding so. The court says there is a duty to look ahead but this is due to animals rightfully on the track.

Strong,J. in Brown v. Hummell, p. [illegible], Penn., 1869.

Intruders upon railroad tracks are non-doers. R.R. is not obliged to take precautions against possible injury to intruders. Duty of care towards a person not showing where it is rendered necessary only by his own wrongful act. No matter how great may be the danger of trespassing, the standard of duty in the use of one's property is not elevated or depressed by a varying risk of unlawful intrusions upon his rights.

Case goes to an extreme. Extreme application of maxim that law presumes that every man will do his duty. It lays down the rule that a railroad is never bound to look out for trespassers.

SOUTH & NORTH ALA. R.R.CO. v. [illegible], p. [illegible], Ala., 1887.

Somerville,J. Plff sued for failing to aver that deft's servants in charge of train used proper diligence in keeping a look-out for obstructions on the track, including plff's son who was injured. The train was was going through a large city at a rate prohibited by city ordinance. Under these circumstances it was the duty of persons in charge to keep a vigilant outlook even for trespassers, and failure to do so was negligence.

[illegible] v. LOUISVILLE & N.R.CO., p. [illegible], Ala., 1889.

Somerville,J. No duty on engineer, in the absence of special reasons, to keep a vigilant look-out for trespassers.

Note to the last two cases. Somerville,J. makes a distinction between populous and non-populous territory. He has in mind "Care Care under the Circumstances." Query, as to whether he should not have left the question of care to the jury. See next case.

CINCINNATI &c. R.R.Co., v. [illegible], Ohio, 1871.

Action against railroad to recover damages for killing of horses through alleged negligence of deft's servants. The horses had escaped from deft's enclosure upon the track. Judge charged, that the paramount duty of those in charge of train was the protection of property and passengers on board. But they are bound also to use ordinary care

to look out for trespassers on the track. Question is, considering their paramount duty towards passengers and baggage, would ordinary prudent men, in charge of the train, in the exercise of ordinary care, have avoided the accident.

Compare Maynard's case, ante 268. Higher court means to say that the duty where engineer sees trespassing animal on track is to use ordinary care under the circumstances. Better than Mass. case.

Putting train behind schedule time by stopping for every slight obstruction would endanger lives of passengers by deranging time table.

Court does not lay down proposition like Pa. case that engineer is not bound to look ahead, but holds that he may be held liable for not looking ahead even when track is fenced. Question of care under the circumstances. Case is contra to Palmer's case, ante 265.

No duty to ensure safety of trespasser when his presence is known but owner of land is liable for injuries inflicted by lack of ordinary care. He can eject trespasser using reasonable force.

Where land owner harms trespasser in a way that would be negligent if he knew trespasser were there, liability is question of circumstances as, difference between obligation of engineer of R.R. and driver of wagon along public highway. Engineer may have paramount duty to his passengers. In great majority of cases land owner is not obliged to look out for trespassers, but there may be cases where trespassing is so common that he may be under duty. Conflict of authority. Seems to be question for jury whether under the circumstances land owner should not have looked for tetrespassers.

Why is not a trespass contributory negligence? Because a trespasser is not necessarily careless. 1 Sherman & Redfield on Negligence 4th Ed., sec. 97-8.

FROST v. EASTERN R.R., p. 272, N.H., 1898.

Case for personal injuries caused by alleged negligence of defts. in not properly guarding and securing a turn table. Plff. was seven years old, went on deft's land to the turn table which had been set in motion by older boys, and was injured. It was claimed that defts. were negligent in the construction and condition of the turn table. HELD, that they owed no duty to plff. to keep the turn table in good condition. As a trespasser he took upon himself the risk of danger from the condition of the premises. To recover, he would have to show that the injury was wantonly inflicted or that owner, being present, might have prevented the injury by use of due care after discovering the danger.

No doubt thatadult person cannot recover. So many cases have occurred throughout that it is clear that such turn table is an attraction to small children. Court held that deft. had something on its own land, at a considerable distance from highway, and used that something in the ordinary way.

In some states a child cannot recover, in more the child can recover. 164 Mass. 349 and 145 N.Y. 80 are in accord with the principal case.

KEARP v. MILWAUKEE & ST. PAUL RY. CO., p. 27, Minn., 1875.

Action brought by a child of seven to recover for injuries received while playing upon a turn table of deft. Complaint stated that turn table was situated in a public place, unguarded and in no way protected so that children could not turn it around; that the same was very attractive to children, as deft. knew; that in consequence of deft's negligence in not fastening it, plff. was injured, the turn table being set in motion by other children. Judgment for deft. Appeal. HELD, that plff. occupied a different position from that of a mere voluntary trespasser. Plff. was induced to enter the premises by the temptation of an attractive plaything, and to a child of tender years that is the same as an express invitation to an adult. Deft. knowing all the facts, having allured children into danger, was bound to use care to protect them from it.

Here the turn table was in an open place belonging to the R.R. Co. The court held (see p. 277) contra to the preceding case. The great weight of authority is with this case, but there is a conflict of authority on the point. The probability of seriousness of harm is infinitely less than with an apple tree with rotten branches, which is alluring to children, than in the case of a turn table, so deft. would not be held.

In 89 N.E.Rep. 484, a land owner was held liable in a case where a child was drowned in an unguarded excavation filled with water and floating plank. 100 Penn. State 144 contra. 159 Mass. 288 follows Frost v. The Railroad.

In 21 S.W.Rep. 1082 a case of a ladder against a car, the company wa was held not liable.

In 28 S.W.Rep. 1089, a child jumped on a movingtrain and the railroad was held not liable.

In 82 Minn. 188 and 28 Kansas 147 a car was standing on an incline and the brakes were set. A child loosened the brakes, the car started and a boy was injured. Held, R.R. was not liable.

In 27 Pac. Rep. 689, a heavy hand car was beside the track; boys put it on the track and one got hurt. HELD, R.R. not liable.

In 91 Cala. 298 where there was an older boy present who knew better, the principle of Lane v. Atlantic Works, p. 80 of these cases, was applied.

In 59 N.W.R. 87 a trespassing child was injured by a land owner chopping wood. HELD, wood chopper not liable for not warning child who is injured without negligence of chopper.

In 39 Minn. 144 and 48 Minn. 288 turn table cases, the R.R. was held only bound to use ordinary care. The court held that the R.R. was not bound to secure the turn table so that it could not be unfastened. It added this instruction to the instruction given in the Keffe case. In Minn. therefore the R.R. Co. is not an insurer in such cases but is only bound to use ordinary care simply bound to fasten turn table in ordinary fashion.

The doctrine of the Keffe case is therefore limited; to make deft.

liable there must be reason to believe first, that the dangerous object is likely to attract children; second, that it is likely to result in substantial harm to them. (Prof. Smith feels confident that these two limitations must be applied to the Keffe doctrine,) thirdly, deft. is not liable where his land is left in its natural condition, 1 Seven 2nd Ed., 109, Note 1; fourthly, deft. is not liable if the child knew the danger and knew he had no right to go there; fifthly, deft. is not liable if the child has been warned of the danger or forbidden to go on the land, provided the child is old enough to understand and remember the warning or prohibition The authorities are not so clear on this.

In 79 Texas 356 the court held that the R.R.Co. was not exonorated where older boys set the turn table in motion, their intervention did not break the causal connection.

SECTION III.

Duty of Care towards Licensee.

HOUNSELL v. SMYTH, p. 279, 7 Com. Bench Reports, New Series, 731, 1860.

Declaration alleged that defts. were seized of a certain wat waste land upon which was a quarry; that this land was unenclosed and that all persons having occasion to cross it had been accustomed to do so without hindrance and with the permission of the owners; that the quarry was dangerous to persons who might accidentally stray, but defts. negligently left it unguarded, whereby plff. was injured. Demurrer. HELD, that if one accepted a tacit permission to cross land, such as that in this case, he accepts it at his peril. Owner of the land is not bound to guard him from dangers of which he is unaware.

The passing over deft's land had gone so far that until deft. gave notice, he could not prohibit the crossing of his land. Plff. by rea-

Plff. claimed to recover on the ground of being a licensee; he is such only by reason of deft's not objecting. The case holds that the owner of land is under no more obligation to keep his land in safe condition for licensees than for trespassers.

GLABDON v. THOMPSON, p. 281, Mass. 1899.

Action to recover for injuries caused by plf. falling into a hole dug by deft. on his land and that of a neighbor. Plff. was a bare licensee, if not a trespasser, and walking along in the night fell into the hole. HELD, that she could not recover. A bare licensee, to be sure, has a right not to have force negligently brought to bear upon him, but as a general rule he goes upon the land at his own risk and must avoid the dangers at his peril.

In 38 N.E.R. 187 deft. by his own act caused additional danger of which plff. had no notice. Plff. recovered.

The ruling on page 282 that "an open hole, which is not concealed otherwise than by the darkness of night, is a danger which a licensee must avoid at his peril" is not true unless the danger is of long standing.

GAUTRET v. EGERTON, p. 282, Law Reports, 2 Common Pleas, 371, 1867.

Declaration that deft. was possessed of a close of land, a canal, and bridge over it, which land and bridge persons passing along that way were allowed to use by deft.; that deft., knowing the premises, kept the bridge in such a negligent state of repair, that plff's intestate, walking over it, fell and was killed. Demurrer. HELD, that deft. was guilty of no breach of duty toward plff. The bridge was not in the nature of a trap. The persons who used it did so at their peril as far as its state of repair was concerned. Declaration does not even allege that deceased was unacquainted with the state of the bridge, or that it was not in same condition when permission was first given.

No allegation that danger was not apparent nor that it was not known to deceased, nor that danger being one not readily apparent to passers, was known to deft. So the case is like Hounsell v. Smith. Plff. of course failed on his declaration.

CAMPBELL v. BOYD, p. 288, No. Car., 1888.

Deft. was owner of a mill on a certain stream. Along the stream on each side, two miles from it, ran parallel roads. Deft. opened a connecting way, constructing a bridge over the stream. This way was opened mainly for convenience of deft. and his associates, but it was also used by the public with knowledge of deft. and without objection. Through defective condition of bridge, plff. was injured. HELD, that acquiescence of deft. in use of bridge by public may be considered as an implied invitation to use it. Hence deft. owed a duty to the public whom he invited to keep the bridge in a safe condition.

The paragraph on p. 288 beginning with "the law does not tolerate," is not true. Deft. is bound to give notice of concealed dangers known to him, but not of apparent dangers, or dangers unknown to him.

The court laid great stress on the plff's having been invited. The deft. knew of the defect, the defect was concealed, and there was nothing to put passer-by on his guard, and deft. had an opportunity to warn plff. Hence deft. was liable.

In 28 N.E.Rep. 187 a barb wire fence was stretched across a way which the public had used by license of the owner. HELD, that the land owner was obliged to give some reasonable notice of the revocation-obliged to give notice of a change making the premies more dangerous.

GALLAGHER v. HUMPHREY, p. 288, 6 Law Times Report, New Series, 684, 1862.

Declaration that deft. was possessed of a crane fixed in a certain passageway, along which plff. and others were permitted to pass; that the crane was so negligently managed by deft's servants, that a large weight fell on plff while he was lawfully passing along the way, de doing the damage complained of. HELD, that a permission like this does not impose on owner a duty to fence off dangers, etc.; it is merely a permission to use the way as it is. But it does impose a duty on

him not to be actively negligent toward passers-by, and if he is so negligent, he is liable.

A licensee only has a right to use the premises as they are at the time.

The duty to a licensee after he gets upon the land is similar to the duty towards a trespasser after he gets on land, as regards deft's conduct. Although not under obligation to keep land in condition to be trespassed upon, yet after trespasser gets there, he is under obligatio not to hurt him by act of negligence.

PLUMMER v. DILL, p. 292, Mass., 1892.

Action to recover damages for injuries sustained while leaving deft's building, through deft's negligence in not keeping part of building safe. Plff. did not go there to transact business with any occupant of the building, but merely for hr own convenience to enquire about matters which concerned herself alone. HELD, that owner's duty of care in keeping building safe extends to those who come there by his invitation, express or implied, but not to those who come for their own convenience, or as mere licensees. Implied invitation extends to those only who come for a purpose connected with business of occupant. Plff. here does not come under that head, but was mere licensee.

Plff. went for her own convenience, and not on business for deft. It is not enough that it is business of plff. alone, but it must be the business which is or might be of pecuniary interest to occupant, in order to make plff. a business visitor. Read this case after Indermaner v. Dames, post next. Authorities both ways as to whether person seeking work on premises is a business visitor; 101 N.Y. 891 and also reported in 54 Amer. Rep. 718. L.R.2 C.P.D.308. Beggar not so. As to peddlars, drummers, book agents, etc., they would probably not be held to have right of business visitors unless their presence was expected by deft.; very doubtful question. Note 9, Clerk & Lindsell on Torts, 272, 274, criticises rule that occupant, as to business visitors, must keep promise in reasonable safe condition; warning of danger may supply such care.

SECTION IV.

Duty of Care towards Invited Persons.

INDERMAUER v. DAMES, p. 298, Law Reports, 1 Common Pleas, 274, 1866.

Action to recover damages for injury sustained through alleged negligence of deft. and his servants. Plff. was a gas fitter in deft's sugar refinery on business, when, it being dark, he fell down through an unguarded opening 30 feet and was severely injured. The opening was a shaft four feet square communicating from the basement to the several floors of the building, necessary for defts' business, and necessarily unfenced when in use. Contended for deft. that he was not obliged to fence the shaft at all. HELD, that plff., being in the building on business which concerned the occupier, was there upon his implied invitation, and was not a mere licensee. Toward him occupier owes a duty to

use reasonable care to prevent his being injured by some unusual danger on the premises, such as the unfenced shaft here.

The business for which plff. was present was for advantage of both parties, hence he is said to have been there by implied invitation.

Invitation as used technically does not mean invitation as used ordinarily; business visitors would be better. Duty towards these is greater than that to licensee; not only to warn of concealed dangers, but to take reasonable care to ascertain whether there are concealed dangers. Business visitor is one who comes impliedly on invitation of owner on business which is or might be of pecuniary interest to owner.

Licensee is used sometimes to mean that express permission is given, and at other times to mean license by sufference. One who goes upon land without owner's permission, takes risk of apparent (not hidden) dangers. Owner owes duty to warn licensee of concealed dangers known to owner. Occupant and licenser, or owner, is not liable for failing to take ordinary care to ascertain whether there is danger or not. Although he is bound to give notice of such dangers when he has such knowledge, he is not bound to acquire such knowledge for the benefit of the licensee. See Clerk & Lindsell on Torts 272,274.

SOUTHCOTE & STANLEY, p. 808, 1 Hurlstone & Norman, 247, 1856.

Declaration that deft. was possessed of a hotel, into which he had invited plff. as a visitor; that there was a glass door which plff. had to open in leaving, and which through negligence of deft. was then in such insecure and dangerous state that when plff. opened it a large piece of glass fell on him and injured him. Demurrer. HELD, that the rule which applies to servants applies also to visitors in a house. Servant undertakes to run all the ordinary risks of service, including those arising from negligence of fellow servants. Similarly visitor, on entering a house, takes his chances with regard to negligent omissions of master or his servants.

On demurrer to declaration, which stated that plff. was there as a visitor, not as a paying guest. No allegation that deft. knew of defection in door. Case holds that person invited in ordinary sense, of the word, not as a business visitor, has no more right than a licensee. Strong argument against use of word "invited."

This case is law in England, but has been strongly attacked.

DAVIS v. CENTRAL CONGREGATIONAL SOCIETY, Mass., 1880 (p.808.)

Port for injuries occasioned by a fall while passing out from deft's church. Plff. had been attending a conference at the church in response to a general invitation which had been sent to her church and others, and was injured while coming out, through alleged negligence of deft. in having premises in a dangerous condition. Verdict directed for deft. HELD, that fact that plff. was there, not by mere license, but by invitation, imposed on deft. the duty to keep the premises in a safe condition, notwithstanding that no pecuniary benefit was expected by deft. Question whether or not deft. exercised reasonable care should have been left to the jury. New trial ordered.

Business visitor is confined to persons who are invited on what is or may be the pecuniary interest of occupant. Court here lays great stress on the deft's invitation, but decision can be supported on the ground that walk was not properly guarded and lighted so that under the circumstances deft. might have been liable to a licensee. Colt probably would have decided Southcote v. Stanley contra to English court, which case has been severely criticized in England, because guest does not stand in the same relation as a servant. See Pollock. In U.S., question is open, but tendency is to differ from S.V.S.

SWEENY v. OLD COLONY, &c. R.R.Co., p. 802, Mass., 1865.

Port for personal injuries sustained by being run over by deft's cars. Plff. was crossing the railroad on a private way, which, by permission of defts., had been used by the public for several years, and at which they had stationed a flagman. Latter made a signal that there was time to cross, but was struck by a car. Contended for defts. that they were notliable as plff's use of the crossing by licese was at his own own risk. Judge charged, that defts. were not bound to keep a flagman there, but as they did, they were responsible for his negligence. Verdict for plff. HELD, that the charge was correct. Were passive acquiescance by an owner in a certain use of his land by others involves no liability, but if he expressly or impliedly induces them to enter on his premises, he becomes bound to see that they are reasonably safe. Facts of this case show that the license to use the crossing had been enjoyed under such circumstances as to amount to an inducement to public to use it as a highway. By keeping a flagman there they became liable for his negligence. Judgment for the verdict.

This case is often cited as deciding that defts. were bound to keep crossing in order, but it held only that if flagman was there, he must not be actively negligent. Railroad gave public to understand that it was safe to cross by keeping a flagman there to give signal. Case is clearly right in itself; even though plff. were only a licensee, if public was only a licensee it would have right to be protected against or warned of hidden dangers. It seems as if there was greater right for public against railroad where the latter has fitted up crossing so that public may pass more easily. Argument vs. this in Thorndyk's argument, in 155 Mass. 472; 12 N.E.R. 551; argument vs. Thorndyke in 60 N.E.R.669. As to liability of land owner to persons who are in exercise of right although not on inbitation, as sheriff serving writ. Courts probably hold that it is at least as high as that towards licensee. Occupant could hardly be held liable if he had no reason to suppose anybody would come in. 34 N.E.R. 1113, court held fireman was no better off than a licensee. 32 N.E.R. 182, Ill. 185 Mass. 118, 189 Mass. 815, 38 N.Y. Superior Ct. 188, seem more inclined to favor plff. As to premises in possession of tenant, where third person is hurt by defect, as to when plff. should sue tenant and when landlord, see Rev. on Negli. 1st Ed. 1074,1076 2 S.& R. on Neg. 4th Ed., secs. 708-to 712.

Fireman only licensee: 29 Atl. R. 6; 51 Atl. R. 582.

Duty of land owner to refrain from harming by negligence after presence is known is the same with regard to trespassers, licensees, and business visitors.

As to defects in the premises his duty is more difficult to state. How is it as to trespassers? Practically no duty. As to licensees duty is to warn him of concealed danvers known to occupant, but no duty to ascertain dangers. Bound to give licensee benefit of his knowledge, but not bound to acquire more knowledge. To business visitor there is additional duty to use due care in discovering dangers and giving warning. But this is not statement ordinarily made, which is, that duty is to keep premises in reasonably safe condition for business visitors. C & L. 871,n.c. Often hard to determine who are business visitors: 101 N.Y. 891; L.R. 2 C.P. D. 108, contrary cases as to man entering to seek employment. When it is once determined that a man is a business visitor there is no doubt as to duty owed him.

Where there is no representation that a railroad crossing is a highway, duty should be only that toward licensee. You can find any statement you want on this point in the books. Sweeny case all right as there was a representation at the moment that the road was safe.

CHAPTER VIII.

EXTRA HAZARDOUS OCCUPATIONS. - ACTING AT PERIL. - DUTY OF INSURING SAFETY.

FLETCHER v. RYLANDS, p. 816, Exchequer, 1865.

Action to recover damages for an injury caused to plff's mines by water flowing into them from a reservoir which deft. had constructed. Deft. had employed competent persons to construct the reservoir to supply their mill. Neither deft. nor the workmen knew that coal had been worked under or near the site of the reservoir, but as a matter of fact there was old coal workings under the reservoir, communicating by means of other old workings with plff's mines. In the course of excavating for the foundation of reservoir shafts filled with rubbish were unearthed but it was not known that they led down to coal workings. Defts. were in no way negligent, but the persons employed by them did not use reasonable and proper care with respect to the shafts so discovered. When the reservoir was partly filled, to one of the shafts gave way, water poured down through the old workings, into plff's mine, doing serious damage. HELD, in Exchequer, that plff. could not recover, as defts. were not negligent. Reversed in Ex. Chamb. where it was HELD, that plff could recover, on the ground that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if it escapes, must make good the damage done. Such things as cattle, water, filth, stenches. This judgment was affirmed in the House of Lords, Lord Cairns drawing a distinction between a natural and a non-natural use of land, holding the land owner absolutely liable for damage caused by latter.

The majority of the Exchequer said practically that deft. was in no fault, and that if he is not in fault, he is not liable. It is true that there was no personal fault on the part of deft., but the persons he employed were negligent with reference to the shafts discovered in not providing for the sufficiency of the reservoir to bear the pressure of the water, which when filled it would have to bear. Prof. Smith thinks the case ought to have been decided on this ground, that deft. was responsible for the negligence of these persons even though they were independent contractors. The case seems to be wrong on this point. Bish. Non-Con. Law, sec. 829, note. 125 Mass. 240. The nature of the duty was such that deft. could not exonerate himself by the employment of an independent contractor. The courts above ignored this point. They assumed that there was no negligence on deft's part and then went on to decide the case in the absence of negligence.

The student should commit to memory the sentence at the top of p. 888, it is the ratio decidendi of the case.

Next in importance to this is Cairns' statement about natural and non-natural user of land.

Cranworth goes simply on the ground that plff. has been damaged and not on the question of lack of care by deft. This is the oldest of the three theories in the case. Cranworth's theory, in the first place, cannot possibly stand. Cranworth's theory would simply amount to transferring the hardship from one to the other. It imposes the entire loss on the faultless deft. merely because he is the innocent instrument through which the damage occurred. But it might be suggested in favor of the decision in this case, that as deft. had the profits of the reservoir, he should pay the damages out of them.

For a criticism of the maxim: sic utere &c. See 9 Harv. Law Rev. 14 to 17.

By natural and non-natural use Lord Cairns seems to have had in mind a distinction between the use of something already on the land and something not on the land. Cairns' distinction is not maintainable; it is criticized on p. 88 of the Cases. Cairns' view as to doing it at deft's peril is criticized in Markby's Ele. of Law 3rd Ed., sec. 898. See also 88 Atl. Rep. 286 bottom of 289. An important case is Coal Co. v. Sanderson, 114 Penn. state 128, contra is 88 Atl. Rep. 288.

As to the falling of a house being prima facie evidence see 57 N.Y. 587, S.C. 15 Am. Rep. 540; L.R. 5 Q.B. 411, S.C.L.R. 6 Q.B. 759; 40 Pac. Rep. 1020, authorities. 41 N.H.R. 81. For a discussion of the Sanderson case, supra, by Pepper see 21 Am. Law Register n.s.88 to 44. For the history of that case by Guest see 58 Am. Law Reg. n.s.p. 1 and at p. 97. 145 Penn. State 324 is distinguished from the Sanderson case, as here the owner was bringing something on the land from a distance. In Nauck v. Co. 159 Penn. State 366, S.C. 84 Am. State Rep. 710 the oil was not taken out on the land through which it was carried.

L.R. 1 Indian Appeal, 334, Madras R.R. v. Zemindar, supports principal case because the tanks are absolutely necessary for development of

India; decision of judges in India is more important than judges in England. 41 Pac. R. (Mont.) 481 is like Indian case, but here ditches were made to carry water through the country for irrigating and ditch gave way without negligence; court decided like Indian case. Similar case in Cala.

As to saying that deft. is liable in these cases because he committed a nuisance - L.R. 2 Q.B. 247 says it prolongs the dispute because nuisance may mean something which is not actionable and using it here does not advance the reasoning at all; simply a circle - it is a nuisance because it is actionable and it is actionable because it is a nuisance. Also, Cooley on T. 2 Ed. 672; 3 Blk. 215; 1 Harv. Law Rev. 133, 135, Langdell.

Courts of every country will probably hold that there are some acts which if done in that community are extra hazardous and deft. must be an insurer as to such acts. But the test as to what is extra hazardous varies in the same community at different dates, as Fulton would probably have been held liable if his first steam boat had burst and caused injury, though Losee case in N.Y. is contra now when steam is so generally used. See Pollock on Law of Fraud in British India. Thoughts of Pascal, London Ed. 1888, p. 61 is wrong; facts are different in different countries, as keeping an elephant in England and the same act in India. Pollock on T. 2 Ed. 420, 421, 428; magnitude of danger and difficulty of proving actual negligence as the specific cause of the harm. Holmes on Com Law, 154: The possibility of a great danger has the same effect as the probability of a less one, and the law throws the risk of the venture on the person who introduces the peril into the community. Innes on Torts: Such things as tigers, etc., however carefully kept, imperil the rights of others because they cause danger to rights in the absence of a degree of care and prudence, the continual exercise of which cannot be expected. Degree of care necessary is so great that it cannot be expected that people will continually use that care, therefore they ought to be held to be absolute insurers. Experiments and new methods will largely be held to be at the risk of the experimenter; courts will also be very slow to hold doctrine of insurance as belonging to user of any kind which is common or necessary or highly beneficial.

Blackburn's test at top of page 888; improved by inserting "likely to escape" after word "Anything." If we adopt Blackburn's test, we will hold owner of land liable for many things necessarily done upon land. As to the analogies mentioned in case, some of them are exceptional, p. 858. Blackburn and Bramwell in their analogies have taken specific cases and ignored other specific cases which are not so exceptional but more ample in their application. Analogies in support of cases are, trespasses by cattle and liability for fire. As to carriers and innkeepers, great liability, more than ordinarily, is imposed upon them because they have a chance to charge extra price, knowing their extra liability, and that the public has to trust people in such public employments. As to alkali, it is answered in Brown's Case following.

As to filth, it is the same thing as principal case over again. When a man builds a dam, his precise purpose is to keep the water back and he can ascertain how much land will be covered by the water; complaint is that he persisted in holding back water, although he knew it flooded the land. Cooley on T., 2 Ed. 877 to 880, N.2. But as to water overflowing land below by bursting dam, it is not so. In latter case, deft. is also a loser by the accident, while in former case he overflows land for his gain. As to selling poisonous articles without proper label, it is clearly negligence. Cases of damage by blasting rocks - authorities are in conflict in U.S. Hay v. Cohoes Co. 2 N.Y. 159; S.C. 51 Am. Dec. 279; Beeth v. R.R. 140 N.Y. 267; S.C. 37 Am. D. State Reports, 552; 9 Lewis Am. R.R. & Corp. Cases, 92 with important note. As to analogies in general, see 2 Austin on Jur. 3 Ed. 855, 854, 1080 to 1086.

As to authority of F. v. R., subsequent cases in England try to distinguish it. Pollock's Lectures on Law of Fraud in India, p. 53, 54; it is followed only in the letter and not in the spirit. 5 Harv. L.R. 128, N.1. In U.S. majority of the states have not decided the point. Cahill v. Eastman, 18 Minn. 324, inclines towards principal case. Mass. seems to accord. N.J., N.H. and N.Y. are strongly contra.

Two tendencies now; first, to extend liability for negligence, i.e., for consequences of negligence in fact; second, to restrict liability in absence of negligence or wrongful intention.

If Fletcher v. Rylands is to be adopted at all, Prof. Smith thinks Blackburn's rule (see p. 222) should read, anything likely to escape and do mischief rather than as it does. But he doesn't agree with it even then.

NICHOLS v. MARSLAND, p. 242, Exchequer, 1876.

Action by surveyor for County of Chester, for damage caused to bridges by bursting of dams on deft's land. A stream ran through deft's land, he dammed it, and made three pools, the water ran on, under plff's bridges. A more terrific thunder storm than had occurred for years caused stream to overflow, to back down embankment and to wreck bridges. Jury found that the accident was caused by vis major; that the rainfall was most excessive and there was no negligence. HELD, in Exchequer (and affirmed in Exch. Ch.) that plff. could not recover, as the injury was the act of God. Differs from Fletcher v. Rylands in that there deft. did the injury directly, though in ignorance. Here deft. merely kept the water, which was set loose by another agent over which he had no control. As in case of other duties imposed by law, act of God or public enemy is an excuse.

Here the forces of nature which broke the dam were gravitation and an unusual storm. The former is a force constantly at work, the latter is one which no one would expect and forsee. Such forces of nature as one could not reasonably be expected to guard against are acts of God. This case establishes an exception to Rylands v. Fletcher where the loss is occasioned by an act of God. Under this rule the jury can practically mitigate the rule in Fletcher v. Rylands whenever it seems too hard.

See Pollock on Torts 2nd Ed. 428.

5 Harv. Law Rev. 183 note has some good remarks upon how Fletcher v. Rylands is treated in England.

BOX v. JUBB, p. 349, Exchequer, 1879.

Action to recover damages caused by overflowing of deft's reservoir. The reservoir was supplied with water from a main drain, into which the surplus water passed again. The overflowing was caused by the emptying of a large quantity of water into the main drain above deft. from a reservoir belonging to a third party and an obstruction, unknown to deft. in the main drain below outlet of his reservoir. There was no negligence. HELD, that deft. was not liable, as he was guilty of no breach of duty which caused the injury, but latter arose from acts of third party, which deft. had no means of preventing. Rylands v. Fletcher is distinguishable, for here the water which did damage was not accumulated by deft. but has come from elsewhere and been added to what was properly and safely there. Judgment for deft.

At first glance this case would seem to come under Fletcher v. Rylands but instead establishes the principle that if the escape of the dangerous article can be ascribed to the wrongful act of a third party, the deft. is not liable. It is a recognized exception to Fletcher v. Rylands in England and would probably be followed in the U.S. If Fletcher v. Rylands is correct, this exception ought not to apply to a case where deft. could reasonably foresee the wrongful act, but it is doubtful whether the court would actually hold a deft. liable in such a case.

MARSHALL v. WELWOOD, p. 352, N.J., 1878.

Suit for damages done to plff's property by the bursting of a boiler of a steam engine on adjoining land of deft. Judge charged that deft. was liable, irrespective of any question of negligence. Verdict for plff. Motion for new trial. HELD, that this charge, though supported by Fletcher v. Rylands is wrong. The judgment in that case extends the rule applicable only to a few very exceptional cases, such as that of trespassing cattle, into a general principle. No foundation for the principle that a man is liable for damage caused by lawful acts done with care. There must be culpability. It was a question for the jury in this case whether there was any neglect on the part of deft.

It is so held also in Losee v. Buchanan, 51 N.Y. 475.

BROWN v. COLLINS, p. 357, N.H., 1878.

Trespass to recover value of a stone lamp-post situated in front of plff's place of business. Deft. was driving a pair of horses near a railroad crossing. The horses were frightened by an engine, became unmanageable, and ran against the post in question, breaking it. Deft. was not negligent. HELD, that the extension, in Fletcher v. Rylands, of the doctrine that in trespass damage, and not culpability, was the thing to be looked at, is contrary to principle and analogy. Fault must be shown. A man is not liable where, as in this case, superior force overpowers him and uses him or his property as an instrument of

violence.

A driver of horses is not liable for damages to real estate, done by them, if he loses control of them without any negligence or fault on his part.

This case differs a good deal in facts from Fletcher v. Rylands but that case is considered much in the opinion. This is one of the ablest opinions against that case. This and Marshall v. Welwood should be studied carefully. They contain the chief anti F.v.R. arguments. F.v.R. has not been overruled in England and there is a tendency to follow it in some states of this country.

CHAPTER IX.
LIABILITY FOR FIRE OR EXPLOSIVES.

DEAN v. McCARTY, p. 268, 2 Victoria. 2 Upper Canada Q.B.,448.

Action on the case for negligently keeping fire which deft. had kindled on his own land, by reason whereof it spread to deft's land and did damage. Deft. used due care, but a high wind sprang up causing the damage. It was sought to hold deft. to absolute liability. HELD, that this is not one of the cases where a party is held liable regardless of negligence. Here deft. was engaged in doing a necessary act with due care, when an accident was caused by act of God. To hold him liable would be to depart from settled principles.

If we apply Fletcher v. R. deft. would have been responsible. But court holds that lighting the fire is indespensable; such acts are so common and so necessary that deft. must not be held liable. Law in England is unsettled but in U.S. it is well settled in accord with this case; that one who, without negligence, sets a fire on his premises for lawful purposes and watches it with care after it is set, is not liable for damages caused by it in absence of negligence. American doctrine as to fire applies to manufacturing and mechanical purposes. Would probably also hold as to setting fires for amusement.

BACHELDER v. HEAGAN, p. 272, Maine, 1840.

Action on the case to recover damages alleged to have been done to plff's land by deft's negligence in setting a fire on his own land and not carefully keeping it. Judge charged that burden of proof was on plff. to show negligence on part of deft. Verdict for deft. Exceptions. HELD, that charge was correct. No absolute liability on one who sets a fire in his own field. Negligence is the gist of the action and plff. must prove it.

The instruction given in the last six lines p. 272 of the Cases is incorrect. Proof beyond a reasonable doubt is required only in criminal cases. In a civil action you only have to prove a balance of probability unless in some courts. Unless the facts showed arson here, the court erred in saying that the plff. must prove beyond a reasonable doubt.

Deft. is not liable without negligence and the burden is upon plff. to show that the deft. was negligent.

BURROUGHS v. HOUSATONIC R.R. CO., p. 871, Conn., 1842.

Action on the case to recover damages for plff's building burned by means of a spark from locomotive of deft's. Judge charged that plff. could recover, irrespective of negligence on part of defts. HELD, that this was wrong. If defts. were doing a lawful act in a careful manner, they were guilty of no wrong, and hence not liable. Negligence must be proved to charge them.

Court below thought this was an extra hazardous use of land and he must do it at his peril. But State had authorized deft. to do it carefully and not negligently. Effect of charter as protection is first, against indictment for public nuisance if road is run in usual manner, and secondly, it seems to be regarded by weight of authority as preventing the courts from holding that this is an extra hazardous use. Legislature could not authorize railroad to run its engines carelessly and negligently. There are statutes in some states which hold railroad company liable irrespective of negligence if fire is started by locomotive sparks which statutes are generally held constitutional.

Where deft. is not an incorporated railriad, judge would probably allow a charge to jury that carrying fire around in locomitive was per se negligence. If there was a charter from Legislature, courts which adopt F.v.H. would not submit to jury whether it was negligence as a matter of fact, to do precise thing that Legislature had permitted to be done. 138 Mass. 289; 155 Mass. 582.

HEEG v. LICHT, p. 879, New York, 1880.

Action for injuries to plff's buildings caused by explosion of a powder magazine on deft's premises. Plff. contended that the powder magazine was a private nuisance for which deft. was liable in damages, regardless of negligence. Judge charged that deft. was not liable unles negligent. HELD, that this was wrong. If the powder magazine was in close contiguity with buildings, it would doubtless be illegal, and owner would be liable for all damages done. Question should have been left to jury whether under the circumstances of locality, etc., deft. was chargeable with maintaining a private nuisance and so liable for damages resulting.

S.C. below, 18 Hun 257 contains better statement of facts. Nuisanc per se is an actionable tort. Authorities somewhat in conflict but this is Smith's view; one who manufactures dangerous explosives or who stores them in large quantities in such a locality or under such circumstances as to cause reasonable fear to persons living in the vicinity, is liable, irrespective of negligence in the mode of manufacturing or in keeping, for all damages by explosion. Query, whether authorities might not hereafter justify us in adding: Unless in case of storage the magazine is located so as to endanger as few persons and as little property as possible and yet be reasonably accessible as a point of supply and distribution. Taken from Trunkey, J. 91 Pa. St. 251. Possibility of a great danger has the same effect as probability of a less one "Reasonable fear" supra, means whether person of average nerve and cour-

age would be put in fear. In the U.S. it is a question for the jury and the test is whether the owner was making a reasonable use of his land.

The American law is well settled that if a man is using fire on his own premises for a lawful purpose, he is not liable unless for negligence. Time, place etc. may show negligence, but there must be negligence to make him liable. Some courts might apply the natural and non-natural user test, but generally in this country the above rule is applied with the qualification that deft. is using due care under the circumstances. It would make no difference whether the fire was for amusement or for business purposes. Cooley 2 Ed. p. 700, but Prof. Smith would hold the deft. liable as the reasons for a contrary decision do not apply, the fire being unnecessary for amusement.

CHAPTER X.

LIABILITY OF OWNER, OR KEEPER, OF ANIMALS.

Section 1.

Trespass by Animals on Land.

WELLS v. HOWELL, p. 384, N.Y., 1822.

Action to recover for damages caused by deft's horse trespassing in plff's field. Plea, no fence around the field. Demurrer. HELD, that every unwarrantable entry on another's land is a trespass, whether the land be enclosed or not. A person is equally answerable for the trespass of his cattle as of himself.

At common law entry by cattle is the same as entry by owner.

At common law there is a fiction that all land is enclosed.

TONAWANDA R.R. v. MUNGER, p. 384, N.Y., 1848.

In a case of trespass by deft's cattle on plff's land, it is immaterial that deft. used ordinary care in taking care of them. Deft. is bound at his peril to keep his cattle at home.

Rylands v. Fletcher doctrine applied to cattle. No defence that even extraordinary care was used to keep them out.

NOYES v. COLBY, p. 385, N.H., 1855.

Trespass for breaking and entering close. It appeared that deft's cow was in a pasture, that one, Heath, in getting his own cow, let out deft's and drove her along the road to a place about 200 feet from plff's land, whence she strayed and committed the trespass complained of. Contended for deft. that as he had done no wrong he could not be held liable merely on account of ownership, but action should have been against Heath. HELD, that owner is not liable when his cattle are driven on another's land by a third party without his knowledge. But here, as soon as Heath abandoned the cow, legal possession revested in deft. and he was answerable as for the other beasts in his custody, for any trespass.

Had H. driven the cow onto deft's land, deft. would not have been liable, but as soon as H. left the cow, she was restored to owner's possession. This latter is not true of all things, but is of cattle.

This latter is not true of all things, but is of cattle.

It is a hard case, but the weght of authority is with it. Blackstone seems to say that the ground of the rule is negligence presumed by law.

BROWN v. GILES, p. 887, 1 Carrington & Payne 118, 1825.

Action against deft. for breaking plff's close with dogs and trampling down the grass. It appeared that owner was walking along highway with the dog, when it jumped over into plff's field. HELD, that the dog jumping into the field without consent of owner was no trespass.

It is difficult to restrain a dog or a cat and they do little damaage, and so are allowed more liberty by custom than other animals are. These are the chief reasons for not holding the owner liable for trespass 45 Mis. 536, is contra to the principal case and in accord with Doyle v. Vance.

If the dog was in the habit of committing such injuwy, and the owner was notified of that habit, he would be liable as much as for the trespass of a horse or cow. Ames' Cases on Torts, p. 848. Bish. Non-Con. Law 1288.

Plff. afterwards introduced testimony to show that deft. on another occasion personally entered the close and therefore plff. obtained a verdict. HELD, that no recovery could be had for entry by the dog without incitement by master. If dog accompanies master and does substantial damage, plff. could probably recover. Case is authority that in England owner of a dog was nkt liable for nominal damages by dog's entry upon polff's land.

TILLETT v. WARD, p. 887, Q.B., 1882.

Action to recover for damage done to goods in plff's shop by deft's ox straying from the highway. He was being driven along by deft's servants and no negligence was proved. HELD, that where a man has cattle in a field he is liable absolutely for their trespasses, but where he is driving them along the highway he is not responsible, apart from negligence, for damage done by them upon the highway or upon adjoining property.

Old reason given for strict rule of common law to cattle was, trespass by a man's cattle was equivalent to a trespass by himself. But better: It is to cattle's owner's interest to have his cattle feed on other's land; if they stray, they generally do damage, and it is comparatively easy to restrain them; they seldom get out if properly taken care of, and it is very difficult to prove negligence.

Rule here is correct. Easy to restrain animals when in pasture, but more difficult to restrain them from temporarily straying when driven along highway. Greater likelihood of doing substantial damage where animal strays from owner's land to neighbor's of its own accord, than where it is driven along highway, although in principal case the damage happened to be great.

Owner of certain kind of animals is under an absolute duty, irrespective of negligence, to prevent his animals from straying on another's

land, except when straying from the highway while being lawfully driven thereon. While they are so lawfully driven on highway, he is only bound to take care that they do not stray and is liable if they stray through negligence. Clerk & Lindsell on Torts, p. 8. As to analogy in Fletcher v. R. breaking out of cattle is more common, but breaking away of reservoir will cause much more damage; one reason for rule in cattle cases is the great chance for false testimony, which would not be so great in reservoir case. In reservoir case owner has an interest in his reservoir not breaking away, but in cattle cases owner has an interest in their feeding on another's land. Also, remedy in impounding; it is almost valueless if negligence has to be proved. In U.S. also rule as to trespassing cattle has been abrogated.

WAGNER v. DISSELL, p. 390, Iowa, 1858.

Replevin for cattle. Deft. answered that the cattle were trespassing upon his unenclosed land and he distrained them. Demurrer. HELD, that at common law owner of land could destrain any cattle found trespassing, and did not have to fence against them. But only so much of the common law has been adopted in this state as is applicable to the changed conditions of life here. This particular principle is ill adapted to a new country. Long usage to the contrary and a series of statutes on kindred subjects show that it has never been adopted. Crops are universally enclosed and cattle allowed to run at large.

Universal understanding of the community had great weight. Old common law rule is rejected generally throughout the southand west. This case shows that it has been rejected so far that the land owner cannot impound.

The owner of cattle is not liable if his cattle go on another's land in that part of the country, but he has no right to have his cattle there on another's land. The land owner can keep them off by any means he chooses short of injuring the cattle.

UNION PACIFIC R.R. v. ROLLINS, p. 895, Kansas, 1889.

Court below ruled that cattle running at large upon the unenclosed lands of another are not trespassers; that owners have a right to allow them to run at large for purposes of grazing. This is wrong. Common law has not been repealed in this state. Statutes modify it somewhat as to damages recoverable, and probably make it contributory negligence to fail to have a proper fence. But while they allow cattle to run at large upon the public lands, the legislature could not give the right to go on private property.

This case holds that common law has been changed so far that if B's land is enclosed and A's cattle go there, B has a right to drive them off but has no right of action. As to change in common law see 133 U.S. 320, holding that as to public land of U.S. there is an implied license that they shall be free to the use of the people while they are not enclosed.

ROSSELL v. SCOTTON, p. 897, Penn., 1858.

Trespass to recover damages occasioned by deft's cattle breaking

into plff's wheat field and destroying wheat. It appeared that the cattle at the time were in the possession of one Hill, as agister. HELD, that responsibility for trespass of cattle is not a question of negligence. But it is a responsibility which rests, not upon ownership, but upon possession and use, which give control. If owner is liable in this acase at all, it is in an action on the case, founded on bailee's mismanagement.

Test here is that the person who has the right of control for time being is the person liable for trespassing cattle. If carried out, would hold that owner was not liable for negligence of the agister, if owner has used due care in selection of agister. 64 Ills. 307; 70 Ills. 291.

BLAISDELL v. STONE, p. 400, N.H., 1881.

Trespass qu. cl. for damage done by deft's sheep straying into plff's land from their pasture. Deft. had let his farm and stock to his son, and latter was in possession and control. HELD, that plff. is entitled to compensation. By the common law agistment did not relieve owner from liability. The ancient rule that action may be brought against either owner or bailee is not so devoid of reason as to be cast aside.

The Penn. case says the damaged party can only sue the bailee, not the owner. The N.H. case holds that the owner is liable and would probably also hold the agister liable. There are cases both ways. Of cour course if the owner trespasses with his animals, he is liable for damages done by them.

The owner of certain kinds of animals is under a duty to prevent them from straying on another's land, except when being driven lawfully along the highway, and then he is bound to use due care to prevent them going on and to get them off speedily.

Holmes Com. Law 158 says that animals are inclined to stray, that it is difficult to prove negligence of the owner, and the safest way to ensure care is to throw the risk on the owner. That the difference as to cattle driven on the highway is that there it is easier to prove negligence and harder to restrain the animals, further the owner is bound to get them back at once and so there is less likelihood of their doing substantial damage than when straying from the pasture. In the latter case they may not be discovered for some time.

If a man finds stray cattle on his land he may destrain them, and may impound them for damages. If not paid he can sell them.

As to impounding there are so many loopholes in the process that it is better to bring trespass unless owner of cattle is utterly insolvent. L.R. 1894, 1 Q.B. 809 where land owner brought trespass while he still held cattle impounded; held that he must elect his remedy. 15 Johns 220 held if he impounds and relinquishes he may bring action of trespass. In 18 C.B.N.S. 488 dictum that owner may be held liable for trespass by poultry. Cro.Jac.490 looks as if owner would be liable for trespass by pigeons. 46 Pa. St. 146 as if hogs could trespass. 8 Barb. 680 as

it been could not trespass; Innes on Torts, [illegible], [illegible] as if they could.

The rule that a man is not bound to fence but is bound to keep his animals off the land of others applies to horses, sheep, cattle, probably to hens, 1[illegible] Con. Bench New Series [illegible]; to geese Crokes James [illegible]; to hogs [illegible] Penn. St. 167; not to bees, 1[illegible] Parker, but Innes on T. contra.

Animals which are now the subject of property and are likely to stray and do damage are included within the rule. Whether the law would go farther than this is doubtful. The old test of property and animals is gradually being abandoned and the new test is not well settled.

If an animal of a class not likely to do substantial damage while trespassing, has, in fact, a propensity to do such damage, the owner is probably absolutely liable for trespasses by that particular animal after the owner has notice of the propensity.

SECTION II.

Damage to Animals, other than Chattels or Land.

SEY v. SIMONS, p. [illegible], [illegible], 1[illegible].

Declaration stated that deft. wrongfully kept a monkey in confinement, well knowing that the monkey was mischievous and ferocious, and accustomed to bite mankind; which said monkey did bite plff.; for recovering damages this action is brought. Verdict for plff. Rule nisi. HELD, that whoever keeps an animal accustomed to bite mankind, with knowledge of its propensities, is bound to keep it secure at his peril, and if it does damage, negligence is precluded without express averment.

Declaration alleged the ferocious disposition of the animal and deft's scienter. There was no averment of negligence, but the court held that it was negligent to keep such an animal after knowing its mischievous propensities. The fact at his peril keep in a dangerous animal.

In 10 Queens [illegible] Declaration containing scienter was held sufficient.

WILLIAMS v. [illegible] PALACE AND AQUARIUM CO., LTD., C.A., 1[illegible].

Action to recover damages for injuries inflicted on plff. by an elephant, property of defts. Jury found that the animal was not dangerous to man, that deft. knew it, and that plff. did not bring the attack on himself. Verdict for plff. HELD, that scienter of knowledge by owner of dangerous character of animal would exonerate if the animal belonged to the class of animals harmless by nature, or shown by experience to be harmless in this country. The elephant does not belong to this class, but is one of those animals which owner must prevent from doing injury at his peril. Fact that this particular elephant was harmless is not material.

Court took judicial notice of fact that elephants are dangerous, notwithstanding verdict found contra; depends upon the customs of the community and would not be followed in India. If deft. keeps an animal he is bound to know what the general belief is as to the danger of that

animal or class of animals. Court here thought it best to establish general rule of law that if animals as a class have dangerous propensities, owner cannot escape because he thought this particular animal did not have those propensities. In 38 Barb. 14, Plff's horse injured by fright at sight of an elephant on highway; deft. not liable. Even if an animal belongs to a dangerous class, owner is liable only for such of damages class as animal has a natural propensity to cause.

BUXENDIN v. SHARP, p. 408, Pasch. 3 Will. III., K.B. 2 Salkeld 662.

Declaration for injuries received from deft's bull is bad if it does not allege scienter.

Court holds that intrinsic nature of a bull is not dangerous to man; distinguishes nature of bull here from the nature given to elephant by court in preceding case.

WASON v. KEELING, p. 407, 11 William III. 12 Modern, 332.

Action on the case. Plff declared that deft. kept a certain dog valde ferocem, and let him go loose unmuzzled, so that plff. was bitten by him. It was contended for plff. that charging it to be canem valde ferocem supplied the want of scienter. HELD, that it is not enough that the dog was ferocious, unless deft. knew it to be so. A person shall answer for all damage done by a thing in which he has valuable property, but as to a thing, like a dog, in which he has no valuable property, he shall not answer unless he had notice of dangerous character, or unless the thing was naturally mischievous in kind. Here, deft. had no notice and a dog is presumed to be not of fierce nature.

Even if the injury had been to a sheep, the declaration would have been defective without the scienter. Scienter must be alleged to recover for injury to man or beast by a dog. Statutes generally reverse the common law on the subject even giving double damages occasionally and that without scienter of course. Bish. Non-Con. Law sec. 1238, 1241, and 1248. The reason for that is probably simply the difficulty of proving the scienter. But the lalegislatures probably differ with Lord Holt on the question of the dog's nature. If scienter is proved, negligence is not an element in the case, according to weight of authority.

FLEMING v. ORR, p. 410, quoted in note 2 MacQueen's Scotch Cases on House of Lords, 25, 1858.

Lord Cockburn. In Scotland, if a man's dog worries sheep, the man is liable, regardless of knowledge of a dog's vicious propensities, on principle that it is negligent keeping of a dangerous instrument, to leave a dog so that he can get at sheep.

REYNOLDS v. MUSSEY, p. 411, N.H., 1838.

Case for injury caused to plff. by deft's horse striking him with his forward feet, while standing harnessed and unattended. The deft. knew the vicious character of the horse with respect to kicking, but contended that he was not liable unless he knew that the horse had formerly struck ~~plff.~~ with his forward feet in the manner in which he struck plff.

HELD, that propensity to commit the precise form of damage need not have been shown. It is enough if owner had seen or heard enough to convince a man of ordinary prudence of animal's inclination to commit the class of injuries complained of. In that case, he is bound at his peril to keep him secure.

What is proof of scienter? Here the injury was by the fore feet and the owner knew that he was liable to injure by the hind feet. That is sufficiently similar. If the injury had been by biting, the proof would probably not support the scienter. "Substantially similar" is the test. You do not have to show the actual performance before of the same or a similar injury, but only a propensity to do substantially similar injury. It need not be of precisely the same character as the actual injury. "Viciousness" is a misleading term. Propensity to do such harm in play is just as fatal.

BECKWH v. SAWYON, p. 413, Maine, 1857.

Declaration alleged that deft's horse broke into plff's close and kicked plff's horse so that he died, damages for which plff. seeks to recover. Judge srefused to charge that knowledge by deft. that his horse was vicious was essential to his liability. HELD, that this was right. If domestic animals do damage when rightfully in the place where they do it, owner is not liable unless he knew they were vicious. But here the animal is wrongfully in a certain place; as here, owner is liable for damage done, knowledge by owner that he was vicious is not necessary. Ground of the action is that the animal was wrongfully in the place where the damage was done.

Thomas on Neg., 529, 531, very late authorities on this subject. Declaration was not literally in Trespass quare clausum fregit, but it does allege that horse was on plff's land. Often said that if deft's animal was wrongfully, as against the plff., in the place in which, etc. then owner is liable, not merely for the damage done to the land but for all damages although they are not such as could be expected from that animal. But it is also said contra to this, that even if animal is trespassing on land and does certain damage apart from the trespass, owner is not liable, even then, unless damage was of a kind he had reason to suppose animal likely to do. Authorities in conflict and irreconcilable.

If the animal is lawfully on the land, scienter must be proved. If trespassing on the land, scienter need not, according to some authorities be proved.

The extended liability referred to above is only to the owner of the land and any one who can be identified with him.

DOYLE v. VANCE, p. 416, 8 Victorian Law Reports, Cases at Law, 87, 1880.

Complaint that deft. wilfully kept a fierce dog, knowing its nature, and that the dog worried and killed a mare of plff's. It appeared that the dog ran on plff's land after the mare, and that she tried to jump a fence but fell and broke her neck. HELD, that proof of scienter is not necessary. The dog was a trespasser, and owner is responsibl

for any damages resulting from the trespass. Old notion that dog could not trespass is not well founded; there is no difference between a dog and an ox in this respect.

Held, that if animal wastrespassing owner is liable for the damages caused by his trespass. Change of time and place produce changes in law. 48 Mis. 538. Doubtful in some states as to whether owner is liable for dog's going upon land of another. Very little authority but a tendency to hold the other way. Statutes generally cover the point.

WALLON v. O'BRIEN, R.I., 1880.

Trespass to recover damages for injury received by plff., a young child, in consequnce of being kicked by plff's horse which was astray in the street. Judge charged that deft. was liable even if he did not know horse was vicious and even if he used due care. HELD, that last part of charge was wrong. Deft. is not liable unless he was negligent in allowing horse to escape, or in pursuing him after he escaped. Differs from the cases where trespass to land is the gist of the action.

Horse was not a trespasser as against plff. 49 Conn. 118, deft. turned his horse loose upon the highway; deft. liable for injury to child

COX v. BURBRIDGE, p. 428, 13 Common Bench, New Series, 485-7. 1863.

There a horse strays on the highway and kicks a person, owner is not liable merely because he was negligent in allowing horse to be there. It must also be proved that owner had reason to expect that the animal might do some injury of that sort, for it was contrary to the ordinary habits of ~~the~~ horses.

It did not appear how the horse got there. The injury he did was to the person.

In 18 C.B.N.S. 729, Lee v. Reilly, deft's horse got on plff's land and injured plff's horse, deft. held liable; his horse was trespassing as against plff. Clerk & Lindsell 845, note 5 distinguisheds these cases on ground that it is not in the ordinary nature of horses to kick human beings although it is to kick other horses.

SUMMARY OF THIS SECTION.

If B's horse escapes onto A's land and kicks A's horse and child, some authorities hold rejecting Decker v. Gammon, that B is liable for the injury to A's horse, it being natural for one horse to kick another, but that he is not liable for injury to the child without proof of scienter.

The owner of animals is absolutely liable for injury done other than trespass to land if the animal belongs to a class having a natural propensity to do the kind of damage in question; or if the particular animal, though belonging to a class not naturally so inclined, has a special propensity to do this particular kind of damage, and the owner is aware of these propensities. In these two cases, negligence need not be proved. Some authorities hold an owner liable for any damage done while the animal is trespassing on plff's real estate. On this there is

a conflict of authority especially in cases where the damage is of a kind which that class of animals could not be expected to do and the owner has no knowledge of the propensity to do such damage.

Whether an animal is of a dangerous class or not is a question for the court. In 38 Barbar, the owner of an elephant was held not liable for frightening a horse on the highway.

If the animal is known to have a propensity to do the damage, it is no defence that the owner used the greatest care to prevent an escape. The owner is liable as an insurer regardless of negligence. But deft. is not liable as an in insurer if the animal is liberated by vis major or by the tortious act of a third party. There is no case on these defences and the authorities differ, but the above is probably the law. Bevan on Neg. 1188; Innes on Torts 74, 104; Clerk & Lindsell on T. 852. Bramwell in Nichols v. Marsland.

If an animal belongs to a dangerous class, it is no defence that the particular animal has always been tractable heretofore. Where scienter is necessary and proved then negligence is cut of the question. As to animals not dangerous as a class, it would put too great a hardship on agriculture and commerce to hold deft. liable without proof of scienter.

Becker v. Gammon probably goes to an extreme and perhaps most authorities hold that in such a case deft. is liable for such damage only as may reasonably be expected from the animal.

Dogs stand alone. Bish. Non-Con. Law 1288. Deft. was not liable in the old law for a trespass of his dog, the dog not being regarded as property. The weight of authority is still that deft. is not liable although dogs are now held to be personal property. But the owner is liable if the dog is sent on the land or follows the master, or if the owner (deft.) knows of a special propensity in his dog to trespass and do any special damage.

At common law the owner was not liable for damage done by other acts of his dog than trespass without proof of scienter, but this is changed now owing to the difficulty of proving scienter, and the growth of a feeling that it is the nature of dogs to bite. English judges however are influenced by the value of dogs for defence of property and by a desire to have them for hunting and sporting.

CHAPTER XI.

DECEIT.

SECTION I.

Generally --- Nature of Representation.

PASLEY v. FREEMAN, p. 125, 29 George III. 2 Term Reports (Durnford & East,) 51.

Action in the nature of a writ of deceit. Declaration alleged that deft., intending to deceive and defraud pltf., persuaded him to deliver goods of great value to one Balch on credit, by falsely asserting

that he was a person to be trusted; that plff. delivered the goods and suffered great damage, as Falch was not a responsible party as deft. well knew. Verdict for plff. Motion in arrest that deft. had no interest in the matter and was not guilty of collusion with Falch. HELD, that this makes no difference, as loss to plff. is the essence of the matter. An assertion which is false and which maker knows to be false and makes in order to injure another is actionable, if that other acts upon it and is injured thereby.

This is the leading case on the subject of deceit. A declaration i in deceit should contain six allegations: 1, deft. made a representation; 2, it was false--false is here used frequently to indicate simply not true in point of fact; 3, that the statement was made by deft. with a knowledge of its falsity; 4, that it was made with intent to induce plff. to act upon it; 5, plff. did act in reliance upon it; 6, plff. was damaged by so doing.

The declaration need not allege that deft. was or expected to be personallybenefited by the deceit, or that deft. was in collusion with the person who received the obenefit. The false statement here was not for the benefit of deft. but it injured the plff. It was on a matter of opinion and the deft. lied as to his own opinion. Deft. was not bound to say anything at all, but if he did say anything, he should have done it truthfully.

The action was now in fact, but not in principle at that time. There was no privity of contract, and so the action is in the nature of tort and not contract, and therefore no consideration was necessary to be shown. And the statute of frauds had no application.

Prof. Smith says that where A gets goods promising to pay in future but not intending ever to pay, deceit ought to lie, but it is an open question. See Pollock 442. The seller can at all events rescind the contract.

In Long v. Woodman, p. 487, deft. promised plff. that if he would sell a horse to A, that he, deft., would pay the price. HELD, deceit did not lie. Seeeextract from Pollock p. 442 regarding such promissory statements.

EDGINGTON v. FITZMAURICE, p. 442, Law Reports, 29 Chancery Div. 459, 1882.

Action against directors of a company to recover a sum of money advanced by plff. on debentures of the company, on the ground that he was induced to make the advances by fraudulent misrepresentations of defts. Plff., a shareholder, received a prospectus inviting subscriptions for debenture bonds, the prospectus stating as objects of the issue of debentures, certain improvements which were to be made by the company. Plff. took debenture bonds, relying, as one inducement, on the objects stated in prospectus. At the trial it appeared that the real object of defts. was to pay off pressing liabilities of the company. Contended for defts. that statements in prospectus were not statements of fact, but were declarations ofintention, hence there was no actionable deceit.

HELD, that statements of intention is a statement of fact, and if made deceitfully, or recklessly, regardless of truth, is actionable, if it contributed to induce plff. to advance his money.

The defts. represented that they wanted the money to enlarge the business. In fact, they wanted it to pay debts. Defts. pleaded that they made no misrepresentation of existing facts, that the misrepresentation was as to the state of their minds, that they only misrepresented their intention. But the court held that intention (the state of a man's mind) was a fact, and misstatement of intention was a misrepresentation of a fact.

25 Atl. Rep. 818 decided that recision only could be had in such a case, but upon Lord Bowen's view it seems as if plff. could have there brought deceit. The most famous sentence in this case is that of Bowen at the top of p. 445. In 64 N.H. deft. made a false statemetnaas to his opinion and was held liable in deceit.

Bowen,L.J. in Smith v. Land &c. Corporation says on p. 446, "If the facts are not equally known to both sides, then a statement of opinion by the one who knows the facts best involves very often a statement of a material fact, for he impliedly states that he knows facts which justify his opinion."

SECTION II.

Representation not True in Fact.

KIDNEY v. STODDARD, p. 446, 7 Metcalf, 252, 1842.

Trespass upon the case for an alleged fraudulent representation by deft. as to the credit of his son in a letter in which he said that his son's contracts would unquestionably be punctually attended to. On the strength of this letter plff. sold the son goods. It turned out that the son was a minor, and the goods were never paid for. Judge charged that intentional concealment of a material fact in a letter of recommendation amounts to a false representation, and refused to charge that if deft. gave his opinion merely, he was not bound to communicate any facts. HELD, that charge was correct. Fact that the son was a minor was very material. Deft. designedly concealed this fact, thereby inducing plff. to trust the son, in consequence of which he sustained the loss complained of.

Deft. honestly believed his son would pay his debts and had not said anything untrue, but court instructed jury that if motive of concealment was that if he did not mention fact of non-age, the son would be given a credit which he would otherwise not receive, he was liable. The father intended the plff. to run a risk which he would not otherwise have assumed.

PEEK v. GURNEY, p. 450, House of Lords, 1873.

Here non-disclosure of material facts fromforms no ground for an action for misrepresentation. There must be some active mis-statement of fact, or at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that

which is stated absolutely false.

[illegible]ELL v. [illegible]ALL, p. 450, Minn., 1884.

While a purchaser, when buying on credit, is not bound to disclose the facts of his financial condition, yet if he is questioned and answers he is bound to tell the whole truth, and not give an evasive or misleading answer, which, although literally true, is partial, containing only half the truth, and calculated to convey a false impression.

In the principal case the party received credit on saying he was worth $2800,- not mentioning that he owed $2100. This was such a partial statement that it was calculated to deceive.

The statement was naturally construed to mean that the party had $2800, free of encumbrance. Pollock 2 Ed., 558 says "a statement may be untrue though no part of it is in terms untrue, if by reason of material facts being (intentionally) omitted, the statement as a whole is fitted to deceive.

SECTION III.

Deft's Belief as to Truth of Misrepresentation.

[illegible]ARCH v. [illegible], p. 461, Q.B., 1888.

Trespass on the case. Declaration that defts., being possessed of a mare affected with glanders, in order to induce plff. to buy her, falsely and fraudulently affirmed to plff. that the mare was well and sound, whereupon plff. was induced to take the mare; the mare was not well and sound, as deft. well knew, whereby plff. suffered damage. Judge charged that it must be proved that defts. knew or believed or suspected their statements to be false. HELD, that this was correct. In assumpsit on the warranty, actual falsity, without knowledge or bad faith, is enough, but in an action of tort for deceit, intention to defraud and knowledge that statements were false are the gist of the action

In an action on a warranty, plff. need not prove scienter, but in deceit he must prove scienter. Warranty is defined in Anson on Contracts, Huffcutt's Ed. 259, 272, note: Warranty is a promise of indemnity against a failure in the performance of a term in the contract - a promise to make compensation, Markby, 2 Ed. sec. 604. Nowadays, plff. can join counts for warranty and deceit in one action. 1 [illegible] 575 is wrong.

It is often very doubtful at the time whether there is a warranty or not; on the other hand it is often hard to prove deft's knowledge, so it is hard to tell which action to bring. Counts for warranty and deceit should therefore be joined if the procedure allows of it. Anson on Contracts, 1st Amer. Ed. 295.

In deceit it is sufficient to prove either that deft. knew the statement to be untrue or that he had no honest belief in it.

PEEK v. DERRY, p. 458, Chancery Div., 1887. Appeal Cases, 1889.

Action against directors of a certain tramway Co., claiming damages for fraudulent misrepresentations of defts. whereby plff. was induced to take shares. The alleged misrepresentation was a statement in a

statement in a prospectus that the Co. had authority to use steam or other mechanical power, whereas in reality they had this authority only on condition that the Board of Trade should consent. Judge in the court below held that as he believed defts. thought the consent of Board of Trade was certain to be secured, they were honest in issuing the prop prospectus, and so notliable. This was reversed in Court of App., where it was held that a falst statement, made without reasonable ground for believing it true, renders one liable. In the House of Lords this decision was reversed. It was H+LS, that without proof of fraud no action of deceit is maintainable. Absence of reasonabke ground for believing statement true is not necessarily evidence of fraud. Fraud is proved whein it is shown that a flase representation has been made. (1) Knowingly, (2) or without belief in its truth, or (3) recklessly, carelessly whether it be true or false; in other words, to prevent a false statement being fraudulent there must always be an honest belief in its truth. If fraud is proved, motive is immaterial. Applying these rules to the finding of the judge below, it is clear defts. are not liable.

An important case. 5 Law Quarterly Rev. 481. It is an open question whether it would be followed in this country.

Opinion is generally against the House of Lords as to the facts. Defts. knew that their statements were not an exact truth, the prospectus stated a present right to use steam power, but they hadn't that right. It was subject to two permissions; they believed they would get permission, and thought that was the same thing. They never got the permission. The House of Lords said that a man was not liable if he honestly believed what he said, however unreasonable his grounds may have been.

Assuming the view of Sterling,J. that defts. stated what was not true in fact, but stated nothing but which they believed to be true, the Court of Appeals held, that they must have reasonable grounds for belief in what they stated; that if defts. made a statement not true in fact, with the intention to have others act upon it, deft. is liable if he had no reasonable ground for the belief, even though he believed it to be true.

Some of the defts. must have known that the facts stated were not true, and on the facts they could not have honestly believed what was in the prospectus. The House of Lords is right in law. A man is not liable for telling a statement which is false if he honestly believes it to be true, that is, not liable in deceit. If he makes a false statement in an honest belief of its truth without any reasonable ground owing to carelessness, negligence &c., in looking at the facts, some writers including Pollock say that he ought to be liable in an action on the case for negligence, again England such a liability is created by parliament. But the point is not settled by decision.

Plff. could introduce evidence that there was no reasonable ground for the belief simply to show that deft. did not believe what he stated.

Middle of page 478.

The general opinion of the profession has been since Peek v. Derry that an action of negligence will notlie in such a case. Prof. Smith thinks that taking the view of the facts that the House of Lords took, that the decision is right, because the plff. alleges deceit and proves negligence, which is a variance.

Herschell's three classes of false representation can all be put into one, that is, wherever there is not an honest belief in the truth of the statement there is fraud.

CABOT v. CHRISTIE, p. 482, Vermont, 1869.

Case for false warranty in the sale of a farm. Declaration that th the deft. made representations as to the number of acres as of his own knowledge, intending to induce plff. to believe, and inducing plff. to believe that the farm contained at least 180 acres. The farm did not contain 180 acres. HELD, that a party who is aware that hehas only an opinion how a fact is and represents that opinion as knowledge, does not believe his representation to be true; when a man says he knows of his own knowledge that his farm contains a certain number of acres, the fair inference is that it has been surveyed, and that the owner knows its extent through the survey.

Clearly right. Plff. joined a count in contract with a count in tort. He could not recover on a contract of warranty unless he had such warranty in the deed.

There is a difference between a statement as to the size of a pieve piece of land, and as to the credit of a person. The latter is always or nearly always a matter of opinion. The former is susceptible of actual knowledge,

If a fraudulent representation is material and relied on, the party deceived is entitled to recover damages, even though the jury would think that he wouldhave made the purchase without this representation. That the party would have done if the fraudulent inducement had not been held out is a mere speculative inquiry and not the test of plff's right to recover.

HAYCRAFT v. CREASY, p. 485, 2 East, 92, 1801.

To an enquiry concerning the credit of another recommended by deft., to deal with the plff. a representation was made by the deft. that the party might be safely credited to any amount, and that he spoke from his own knowledge and not from hereeay. HELD, this will not sustain action in case for deceit where damage results from default of trusted party who turns out to be a person of no credit, if it appear that such representation was made by deft. bona fide and with a belief of the truth of it; for the foundation of the action is fraud and deceit in deft. and damage to plf. by means thereof. Taking the assertion of knowledge secundam subjectam materiam, viz., the credit of another, it meant only a strong belief founded on what appeared to the deft. to be reasonable and certain grounds.

Pollock on T. 2 Ed. 252, n.s. Words must be constu

Bonds must be construed in view of the subject matter. Distinguished from preceding case by subject matter. In first case, subject matter was a thing which could be got at with accuracy, and is usually known by owner, but in principal case, it is almost impossible to arrive at absolute accuracy, and it is a matter concerning which the ordinary impression is that deft. is giving only his belief, and that what deft. said as to her financial responsibility was simply an expression of opinion. What was the meaning of the statement? is the question; it is a matter of construction of deft's statement. Prof. Smith does not say that he agrees with case on the facts, in view of deft's statement that she had inherited money. 48 N.J.L.R. 290 might not be followed. 41 N.J.L. 414 matter of common knowledge that directors have very little knowledge of the business of which they are officers.

Distinction between intent and motive. There deft. intended to kill, and wounded and maimed, and was indicted for wounding and maiming, and pleaded that his intent was to kill, ulterior intent was to kill and primary and immediate intent was to maim. 2 Stephens Dig. of Crim. Law of Eng. 111, 112. Warning against the common fallacies, viz., the confusion between motive and intention, and the tendency to deny an immediate intention because of the existence, real or supposed, of some ulterior intention. E.g. love to excess is the motive; stabbing policeman is the intention. 1 Austin on Jurisprudence, 3 ed., 424, 425.

SECTION IV.

Defendant's Intent that Plaintiff should act on the Representation.

Moore v. Hamilton, p. 341, 7 Binney, 105. 1809.

Case for deceit. Defts. with false statements about the honesty of a certain person, thereby inducing plff. to employ him, he embezzled plff's funds. Hence this action. Jury charged that defts. were liable if they knowingly made false representations, likely to occasion loss to plff., intending thereby to benefit themselves. Jury found for plff., but added that defts. were guilty of no actual fraud, but only of fraud in law. Hence it was moved to enter verdict for defts. on ground that part of action for deceit is intent to defraud plff. HELD that jury meant that there was no expectation of personal gain. This is not necessary. It is fraud in law if a party makes representations he knows to be false, and injury ensues, though his motives may not have been bad.

When jury said he had no fraudulent intent, they meant that he had not the motive of selfish gain to himself. Absence of that sort of selfish motive does not prevent action being maintainable. It is sufficient that deft. made the representation that some one of the public should act on it. If he did not suspect that any of the public would act on it, but ought to have so supposed, as an average reasonable man, he would probably be liable.

The representation must be made with the intention that plff. or the class to which plff. belongs would act on it. This is another statement of the same rule. Deft. is also liable of course, as before

said, if an average reasonable man would have foreseen that the statement would be acted upon, This latter test is probably the ture one, although according to Peek v. Derry, the test is, not the average reasonable man, in deciding whether deft. honestly believed thestatement, but whether deft. honestly believed in it himself.

POLHILL v. WALTER, p. 495, 2 Barnewall & Adolphus, 114, 1832.

Action for deceit. Declaration alleged that deft. falsely and fraudulently pretended that he had authority of drawee of a certain bill of exchange to accept it, whereby plff., relying on the pretended acceptance, received the bill to his loss. It appeared that deft. acted in the belief that the acceptance would sanctioned. Jury found that he was guilty of no fraud. Verdict for deft. Motion to enter verdict for plff. HELD, that to maintain action for deceit, it is not necessary that deft. should have intended to benefit himself or injure plff. It is enough if he made a statement which he knew to be untrue, and which was intended by him to induce another to act on the faith of it, in such a way that he may incur damage, and damage is actually incurred. Rule absolute.

Deft. had not wrong motive. but he made a false representation intending purchaser to rely upon it. 1 Bish. Cr. L. 7 ed., s. 341. 2 Bish. 598. 8 L.Q.R. 74.

In order to prove the intent necessary to maintain an action for deceit, it is not necessary that there be any motive of personal gain, to deft. or to any one else. It is only necessary that deft. intended plff. or the class to which plff. belonged to rely upon his statement, or that he ought to have foreseen, as a reasonable man, that plff. would rely on it.

LANGRIDGE v. LEVY, p. 494, 2 Meeson & Welsby, 519, 1837.

Case. Declaration stated that L., the father of the plff., bargained with the deft. to buy of him a gun, for the use of himself and his sons, and the deft. then by falsely and fraudently warranting the gun to have been made by N., and to be a good, safe and secure gun, then sold the gun to L., for the use of himself and sons; whereas in truth and in fact the deft. was guilty of a breach of duty and of willful deceit, negligence, etc., in that gun was not made by N.; was not safe, etc., gun, but on the contrary was made by an inferior maker. It was unsafe; of all which deft. at time of such warranty and sale had notice:--Plff. confiding in warranty used gun as he otherwise would not have done--- it burst and plff. lost the use of his hand. HELD, (after verdict for plff.) action was maintainable.

Case seems to lay down that one who sells an article with a knowingly false representation as to its fitness for use by the purchaser or those to whom the latter may communicate the representation, isliable for injuries resulting from such use. Here the motive was to effect a sale; the intent was that the plff. and those for whom he said he bought the gun should act on the faith of the deft's representations. They did so act, one of them to his damage.

Decision somewhat like George v. Skivington, ante; court decided on the ground that the father had named the son as a user at the time of the purchase. VCourt held that if the person injured is named at the time of the purchase, deft. is liable to him.

BOLFORD v. BARSHAM, p. 501, 4 Hurlstone & Norman, 588, 1859.

Case for deceit. Deft. was director in a mining company. By fal falsely representing that the subscription list was full and 2/3 of the scrip had been paid in, he induced the Committee of the London Stock Exchange to insert the company on the official list, a thing which was only done when the above conditions were complied with. Plff., seeing the mining company in the list and knowing the rules, was induced to buy 100 shares. They proved worthless. Hence this action. Objected for deft. that as the representation was not made by deft. to plff. himself, it was not a ground of action. Verdict for plff. Rule nisi. HELD, that direct communication to plff. was not necessary, if plff. was one of the persons to whom deft. contemplated that the representation should be made, or a person whom deft. ought to have been aware he might injure. In this case all persons buying shares on the Stock Exchange must be considered as persons to whom it was contemplated that the representation would be made.

Plff. was one of the persons whom the deft. ought to have contemplated as liable to act on the representation. Ordinarily speaking there cannot be a duty toward all the world, but there can be a duty towards a very large class. Representation was made to the class of persons to which plff. belonged - persons who knew the rules of the Stock Exchange. Pollock on Fraud in British India 58. App. of Pollock on T., 12th., 555.

The doctrine of this case is limited very much by Peek v. Gurney and Hunnewell v. Duxbury, but Prof. Smith thinks the general statement of the rule in the principal case is correct and disagrees with those two cases.

It is well settled that plff. can recover if he relied mainly on the representation, and in this country he can recover where the representation was one among several other things upon which he relied. The only dispute anywhere is as to how far reliance must have been put upon the representation and how much on other things. This general subject is taken up in sec. 5 of Smith's Cases, p. 511.

PEEK & GURNEY, p. 504, House of Lords, 1873.

A prospectus for an intended co. was prepared by the projectors (the directors of the company) and issued by them to the public; it contained misrepresentations of facts known to those who issued it and it also concealed the existence of a deed which was material to be known, and which, if known, would in all probability have prevented the formation of the company. Being addressed to the whole public, any one might take up the prospectus and read its representations and be induced thereby to apply for an allotment of shares. HELD, that when the allotment was completed, the office of the prospectus was exhausted and

that plff., a person who had not become an allottee but was only a subsequent purchaser of shares in the market was not so connected with the prospectus as to render those who had issued it liable to indemnify him against the losses which he had suffered in consequence of his purchase.

Lord Cairnes' statement tat the bottom of page 502 that the prospectus had done its work is very doubtful. It is a question of fact whether it had or not. The case is criticized in Innes on p. 54, 55, note. It has been held that the effect of a prospectus still survives in such a case. Andrews v. R. 72 Law Times, n.s.728.

Plff. should have asked to have the jury find specially whether the prospectus was part of the general fraud which caused plff. to take the shares, whether the deft. should not have contemplated that more than the original allottees would act on the prospectus. It will usually be found that the latter is the case. If the jury found that plff. was one of the class whom the defts. ought to have contemplated, as likely to rely on the prospectus, the case ought to be decided the other way.

HUNTWELL v. DUNBAY, p. 502, Mass., 1891.

The officers of a foreign corporation executed a certificate required by St. of 1884, C. 250, sec. 2 to be filed with the commissioner of corporations in order that the corporation may do business in Mass., and filed it. Plff. found it on file and was induced by misstatements contained therein to take the promissory notes of the corporation, which proved to be worthless. HELD, an action of deceit cannot be maintained against the officers of the corporation.

Majority of court probably thought that jury should have been asked whether plff. was one of the class likely to be injured by the false certificate. Kent, Comm., Holmes ed. Pol. on T., 1st Ed. p. 140. 51 N.H. 497. Deft. need not intend that plff. should rely on his false representation; sufficient if he ought to have known that plff. would rely on it; doubtful whether defts. should not have contemplated that plff. might rely on this.

Here the majority of the court apparently held that the certificate was not filed with intent to induce people to act on the faith of it. The court thought that the object of filing the certificate being different here from Bedford v. Bagshaw, made a difference. Probably the object was to satisfy the statute, but the question of deft's liability turns rather on whether deft. ought not to have contemplated that the class to which plff. belonged might rely upon it.

Section V. is omitted.

SECTION VI.

Whether plaintiff is barred by failing to use the means at his command to detect the falsehood.

COMSTOCK v. KROW, p. 527, Missouri, 1890.

Action to recover damages for false representations. Deft. in-

duced plff. to accept certain shares in exchange for land, by falsely representing them to be much more valuable than they were. Judge charged, that if plff. by diligent inquiry might have ascertained the truth or falsity of the alleged representation, and failed to make such investigation, then he cannot recover. HELD, that this was wrong. Even where the means of knowledge are equally open to both parties, a man has a right to rely on a positive representation of fact in every case, except where as in statements of value of opinion, the representation was not calculated to put him off his guard. And where, as here, the means of knowledge are not equally available to both parties, the objection to an action that party received was negligent could nowhere be allowed.

Plff. owed no duty to deft. to take care so there is not fault on both sides. Contra, 162 Mass., 280; 9 Harv. Law Rev. 295.

Ordinarily it is no defence to action of deceit for deft. to say that plff. could have found out that he was liable, by making further inquiries. Contributory negligence is no defence to an action for intentional injury. Plff's failure to make enquiries should be no defence. He owed deft. no duty to look up his statements to find out the truth. Deft's act was intentional, was intended to be acted on, and when acted on it was no defence, that the result which he intended, could have been prevented by foresight.

Many cases however have been decided on the ground that plff. was foolish to believe the statement, but in many of them, the nature of the representation was such that vendees generally did not act on such representations.

Prof. Smith says representations as to value, previous prices, of law, ought to be actionable, but point is in discute. It ought to be especially where one stands on a better footing than the other, so too, as to representation concerning quality.

[illegible] Case.

[illegible] - Plff.

[illegible] Defn.

Section 1.

Publication.

[illegible] v. [illegible], p. 297, Nisi Prius, 1818.

Action for publication of a libel. Letter had been written by deft. to plff. containing the libel. It had been delivered to a third party, folded up, but unsealed, and, without reading it or allowing any other person to read it, he then delivered it to plff. HELD, that this was not such a publication as would support an action, though it would have sustained an indictment, as publication to party himself tends to a breach of the peace.

That a third person may have an opportunity to see or hear is not sufficient, or that he be intended to see or hear, if in fact, he does not, no action will lie; there must be a communication in fact to a

third person.

SNYDER v. ANDREWS, p. 387, New York, 1849.

Action on the case for libel, contained in a letter sent by deft. to plff. Before sending it, deft. read it to a person in his office in the presence of his clerk. HELD, that this was sufficient publication to sustain the action.

If it is communicated at any time to a third person, it is a publication.

DELACROIX v. THEVENOT, p. 389, Nisi Prius, 1817.

Action for libel contained in a letter directed to plff. A clerk, as was his custom, read the letter, it not being marked "private." He testified that he believed deft. knew such was his custom whether deft. HELD, that there was sufficient evidence for the jury to consider whether deft. did not intend the letter to come to the hands of a third person, which would be a publication.

If a letter was marked private, and it was not intended that a third party should read it, and not probable that any one out the party addressed would, deft. would probablh not be liable. The opinion might have been made stronger. It is not necessary that he should intend another to hear it; it is sufficient that it be probable that a thied third party would open the letter.

SHEFFILL v. VAN DUSEN, p. 399, Mass., 1859.

Tort for slander. HELD, that proof of publication is essential. It is immaterial that the words were spoken in a public place, they must have been so spoken as to be heard and understood by a third person.

Action can be maintained only for damage done to the reputation in the opinion of other people, and not in plff's own estimation. No action where third person present is stone deaf or does not understand the language. Where letter remains unsealed until it reaches addressee it is not ground for a civil action for defamation. Defamation must be communication to a third person in order to be actionable.

Held merchant dictating to a stenographer liable, but not attorney, 70 Law Times, N.S. 388. Sending postal card would seem to make liable, though it is like delivering sealed letter by servant who does not read it. p. 518. Where A and B jointly compose a libellous letter, it is a publication by each in the presence of the other. 8 Cush. 71. Communication to wife by husband is not slanderous. Communication to a wife defaming husband and vice versa is a publication. As utterers they are regarded as one; as subjects of defamation, they are regarded as two. When the only person to whom statement is uttered did not believe it, and knew it was not true, held actionable. 182 Mass. 225. When speaker thinks he is alone and talks to himself, being negligent as to the presence of others, it would be held a publication. When letter is misdirected to another person instead of one defamed, it is held publication When deft. writes letter and puts it away in his desk, where another person breaks open desk and took letter out, opinions are contradictory, some holding him liable for at his peril to keep it in. Generally

speaking, publisher would ordinarily be held liable for what newspaper contained, although he did not know or might not be to blame for not knowing what was in the paper. He is liable because a principal is chargeable for the acts of his agent done in the course of the principal's business.

SECTION II.

LIBEL.

THORLEY v. LORD KERRY, p. 891, Exchequer Chamber. 1812.

Action for libel contained in a letter addressed to plff. charging him with being a hypocrite and using the cloak of religion for unworthy purposes. Letter was delivered unsealed to a sedvant, who opened it and read it. HELD, that this was a libel, though the words impute no punishable crimes, for they are calculated to villify a man and bring him into hatred, contempt and ridicule. The words if merely spoken would not have supported an action, for though on principle there should be no distinction between words spoken and words written, the cases certainly establish such a distinction and hold that for spoken words of mere general abuse no action lies.

Slander is oral defamation; libel is every other kind of defamation.

If this statement had been made orally, it would not be actionable per se, but it is communicated by means other than oral, and it is therefore actionable per se. Differences between libel and slander.

1. Slander is only a civil wrong at common law; libel is a criminal offence as well as a civil wrong. 2. Spoken words except certain defined classes are actionable only on proof that special damage resulted. All written words if coming within the ordinary definition of libel are actionable without proof of special damage. Libel consists of words calculated ~~to expose a man to~~ hatred, contempt or ridicule. 3. Truth is always a defence to a civil action for slander, but truth though at common law a defence to a civil action for libel is not always a defence to a criminal prosecution.

84 N.Y.R. 921. 70 L.T., N.S. 597. 22 Atl. Rep. 246.

Ordinary definition of libel is words which are actionable per se. Class of words actionable per se is much larger in libel than in slander. All words which would be actionable per se if spoken are so if written. Written words calculated to bring a man into hatred, contempt or ridicule are actionable per se, although the same words if spoken would not be. Serious question whether there should be a distinction between oral and written words.

The dictation of defamatory words by a merchant to a clerk is a publication. The dictation of defamatory words by anattorney to his clerk, the ~~words being to the~~ effect that a charge has been lodged against a third person is not a publication. 2 Harv. Law Rev. 54

A husband uttering defamatory words to his wife about a third party is not a publication, but if a third person utters defamatory words to the wife about the husband, it is a publication. 70 N.J. Law 118. 19 C.E. 896. L.R. 20 C.P.D. 205. 22 Am. Law Reg. n.s. 412.

speaking, military [illegible] for what [illegible] consisted, although [illegible] [illegible] [illegible]

dication to a type writer is ordinarily a publication. 8 Harv. Law Rev. 58. The reading of defamatory words by a post office clerk from a postal card, or by a telegraph operator from a message is a publication. It is not enough that the words were spoken in a public place, they must be communicated tosome third person. An action for defamation is not maintainable merely for damages to the feelings, but where the communication amounts to a public action, injury to feelings may be taken into consideration in estimating damages.

The action will lie even if the third parties do not believe the statements. 7 Indiana 587. The action will also lie if the communication is made privately to a third person who does not repeat it, 1[illegible] Mass. 425. It is sufficient if the words are calculated to injure. [illegible] Fed. Rep. 428. An unintentional and negligent communication to a third party is a publication. 14 Irish Com. Law Rep. 458. 70 L.T. n.s. 8[illegible]. So when a letter is written to A and sent to B, it is a publication. In 159 Mass. 35[illegible], the name of a different man from the one intended was put in the Boston Globe by mistake; it was neither intentional nor negligent, held a publication, but this seems error. In 10 Times L.R. 3[illegible] the trustees of a library were held not liable for a publication in giving out a book containing a libel, the trustees having no reasonto know that the libel was there.

The publisher of a newspaper is liable for the insertion of a libel even though he is ignorant that it is in his paper and had forbidden any such insertion. Cooley [illegible]. Odgers on the Law of Libel and Slander.

SECTION III. (continued.)

(d) Defamatory Words not actionable per se, but causing Special Damage.

DAVIES v. GARDINER, p. 412, Common Pleas, 1598.

Action on the case for slander. Plff. was engaged to be married to X. Deft. with intent to hinder such marriage said and published that plff. had been gotten with child by a certain man, by which report plff. lost her marriage with X. Plff. sues deft. HELD, loss of marriage which insures to plff. support and power, etc., is sufficient damage to maintain the action. Judgment for plff.

In oral defamation some words are actionable per se without proof of special damage, others are not actionable unless special damage is proved. See classification in Index to this volume note p. 396. As to all words of second class, if made orally, can be ground of action only upon proof of special damage. Loss of marriage is actual or special damage. Charge against a woman of unchastity was not actionable at common law, and was not so in England until statute of 1891.

ALLSOP v. ALLSOP, p. 413, Exchequer, 1860.

Deft. said that plff. a married woman, had had connection with him before her marriage with X, whereby plff. lost the society of her friends and became ill and unable to attend to her necessary affairs and business. HELD, the especial damage must not be fanciful or remote, but must naturally and fairly result from the wrongful act itself. Illness

arising from excitement caused by slanderous language is not the sort of damage which forms a ground of action. Judgment for deft.

The case holds that the wife did not prove sufficient special damage. COURT thought many frivolous actions might be brought if held sufficient. Pecuniary loss required for special damage must be the effect of the injurious imputation upon some persons other than the party bringing the action. 17 N.Y. 442.

Roberts v. Roberts, 5 Best & Smith 384 held that merely depriving one of membership in a religious society is not actionable special damage. No actual pecuniary benefit is attached to such membership.

DAVIES v. COLCHOW, p. 414, C.P., 1871

Deft's words caused plff. to lose and be deprived of the companionship and the hospitality of divers friends. HELD, by Blackburn, J. here is some temporal damage though slight, and Moore v. Meagher 1 Taunt 39 holds that the loss of hospitality, gratuitous food, drink, etc., - from friends is sufficient special damage to maintain the action. On demurrer judgment for plff.

Loss of hospitality is sufficient temporal damage, although the hospitality is gratuitous. 5 B.& S., 384. As to plff's damage:

1. It must be damage which occurs through the action of a third person.
2. It must be the loss of a temporal benefit of some pecuniary value which would otherwise have been conferred upon plff. even though conferred gratuitously.
3. Defamation must be the cause in the legal sense of the term of the damage.

The first utterer is sometimes held not liabe for repitition of the slander, it being held generally that that is too remote a result, but Prof. Smith says that if deft. intended or foresaw the repitition he should be held liable.

MILLER v. DAVIS, p. 417, Com. Pleas, 1874.

Deft. said of plff., a stone mason, that he was a ringleader of the 8 hours system whereby plff. lost a good situation. On demurrer. HELD, by Coleridge, C.J., a statement falsely and maliciously made whereby another under some circumstances might probably be damaged, is too broad a rule to allow a recovery under. The words must import the want of some general requisite as honesty, capacity, fidelity, or the like, or connect the imputation with the plff's office, trade or business. The words here are not actionable in themselves. Judgment for the deft.

The word ringleader is by no means a word of bad import.

Declaration here is a warning to pleaders; should have alleged damage to plff. in his occupation. But if deft. says something which he thinks will do damage, and says it in a place where he knows it is likely to cause damage, and he intends it to do damage, and damage results, he ought to be held, if it is false, even though words are not defamatory in their nature. Odgers on L. & S. Am. Ed. by Bigelow. 87 to 91. But though an action of defamation will not lie, it by no means follows that another action will not lie. O.& L. on T. 497,498.

Pol on T. first ed. 210, 211, thinks the insult and not the damage should be the ground of action.

SECTION IV.

JUSTIFICATION.

(a) Truth of Publication.

ROSE v. HILDRETH, p. 419, Mass., 1835.

Plff. requested court to charge that truth is not a defence to an action of slander, if the words were spoken maliciously or without any reason on the part of deft. to believe them true. HELD, that this was rightly refused. A special plea in justification sets forth the truth of the words merely.

Truth is a defence to all civil actions for defamation although made without any reason to believe it is true at the time deft. made it and although he made it with malice. If deft. sets up the defence of truth and fails, the damages will usually be much enhanced. Declaration should allege that charge was false, but it is unnecessary to introduce any evidence of falsity unless deft. sets up truth as justification.

SECTION IV. (continued)

(b) Repetition of Another's Statement.

McPHERSON v. DANIELS, p. 420, King's Bench, 1829.

Slander for an imputation of insolvency. Deft. pleaded he had heard and been told the same by one X. Plff. demurs generally. HELD, declaration alleges that deft. falsely and maliciously published the slander to plff's damage. In order to maintain such an action there must be malice in deft. and damage to plff. and words must be untrue. Where words are falsely and maliciously spoken as here, the law implies damage. Deft. by showing he heard the slanderous matter from another does not negative the charge of malice, for a person may maliciously repeat what another person may have uttered upon a justifiable occasion. (See note p. 421 of these cases.) Judgment for plff.

Contrary to old law, which was supposed for a long time to be the other way. Old law overruled distinctly by this case.

Absolute privilege and conditional or qualified privilege.

1. Chief executive of the nation or state and members of national and of state legislatures are privileged absolutely as to any statements made by them while acting in their official capacity.

2. Judges, jurors, parties, counsel and witnesses are absolutely privileged as to relevant statements in the course of judicial proceedings.

3. Reports of military and navy officers to their superiors, made in the course of official duty. Privilege is absolute in these cases, even though made with malice in fact and without belief in its truth. p.429, n.s.

Defence of privilege presupposes that deft. has uttered a charge, which is defamatory, untrue and tends to damage plff.

SECTION VIII.

MALICE.

BROMAGE v. PROSSER, p. 522, King's Bench, 18[illegible].

Action for slander. Plffs. were bankers. Deft. made some remarks from hearsay which damaged the bank. It appeared that he exaggerated what he had heard. Judge charged that unless the words were spoken maliciously, verdict should be for deft. Verdict for deft. Motion for a new trial. HELD, that the direction was wrong. In the ordinary action for libel proof of actual malice is not essential. In actions for such slander only as is prima facie excusable, as in case of confidential communications to one asking advice, etc., is it necessary to prove actual malice. Rule absolute.

Malice in fact may be important as rebutting conditional privilege. Holmes, Com. Law, 124. Proof of actual malice not necessary for plffs. case, but proof of non-existence of actual malice not good defence. Omission of word "maliciously" not demurrable; indictment, 72 L.T.N.S. 601. 6 Am. L. Rev. 597, 609. Stephen Dig. Cr. Law, 275, n.8. Markby's Pl. of L., sec. 687, 688. Malice is necessary, but law presumes malice means, that malice is not necessary. Judges do not like to appear to make new law, therefore they do not abolish the word malice. Bigelow's Odgers, 8, note a, as to why word malice should be retained. 159 Mass. 298; 24 N.E.R.469.

JACKSON v. HOPPERTON, p. 525, Com. Pleas, 1884.

A, having left B's service at her own desire in consequence of B's accusing her of dishonesty returned to B's house for her boxes and B then charged her with taking a sum of money, and told her if she had come back to work, he should have said nothing about it; and on A's informing him that C was coming to him to get a character, he said he should give her no character, but that if she owned she took the money he would give her a character. On C's coming to him he told her that A was dishonest. A sues B. HELD, that the occasion was privileged, but that the statements made by B to A were evidence from which a jury might infer malice, and that the judge therefore was right in leaving them to the jury, and in asking them the question whether B believed the imputation he made of A to be true. Question was, - What is the predominating motive; is it malice?

Is the deft. entitled to a verdict if he believed the statement true, however mistaken he was? Not necessarily. For an improper motive would destroy the privilege though he believed it to be true. See p. 528. If the sole motive was malice, then he is liable, and, if the predominating motive was malice then probably he would be liable.

COMPVILLE v. HAWKINS, p. 527, Com. Pleas, 1851.

Deft. had dismissed plff. from his service on suspicion of theft, and when plff. was in his counting room, he called in two employees and in the presence of them and the plff. used this language, "I have dismissed this man for robbing me; do not speak to him or I shall think you as bad as him." HELD, a privileged communication, for it was the duty of the deft. and also his interest to keep his servants from associating with a person of such a character as his words designated the plff. to be

It was made under circumstances which rebut the presumption of malice, which would otherwise arise from the nature of the words used.

That presumption being rebutted, it was for the plff. to show affirmatively that the words were spok n maliciously. It is certainly not necessary in order to enable a plff. to have the question of malice submitted to the jury that the evidence should be such as necessarily leads to the conclusion that malice existed; but it is necessary that the evidence should raise a probability of malice. Here the evidence, does not raise any probability of malice, and so that question ought t not to be left to the jury.

Privileged occasion is a better phrase than privileged communication Plff. must prove malice when the occasion is privileged.

JENOURE v. COLMEGE, p. 530, Privy Council, 1890.

Deft. wrote a letter complaining of plff's acts in an official position. He sent it to the wrong authority, but it was held that this made no difference if it was done through an honest mistake. Judge charged that, unlike the cases of master giving character to servant, where one claims a privilege on the ground that the communication was made in discharge of duty, he must prove bona fide. HELD, that this was wrong. In all cases of privilege alike, bona fides will be presumed until plff. has shown express malice.

Point of case is, where was the burden of proof? One of the conditions of privilege is that deft. should believe his own statement. If condition is privileged and plff. claims that occasion can not be regarded any longer as privileged because deft. did not believe what he said, the burden is on plff. to prove that deft. did not believe.

CLARK v. MCLYNOUY, p. 538, Ct. of App., 1877.

Slander. A clergyman made a defamatory statement to his curate in consulting him as to his conduct in an ecclesiastical matter.

Judge in his charge impliedly told jury that as the occasion was privileged, plff. must prove malice. HELD, that this was wrong. A privileged occasion is so for some reason and for that reason only. If deft. uses the occasion for an indirect reason or motive, it is for another reason and the occasion is not privileged. One, but by no means the only, indirect motive which could be alleged, is malice. Real question in this case was, whether deft. did in fact believe his statement, or whether, being angry or moved by some other indirect motive, he did not know and did not care, whether statement was true or not.

Held that the question is not of reasonable belief; if occasion is conditionally privileged and deft. honestly believed what he said, then deft. is privileged, even if a reasonable man would not have believed.

CARPENTER v. BAILEY, p. 537, N.H., 1879.

Libel. Prima facie privilege. Words false. HELD, that deft. needed to show not only proper occasion, but good motive also, that is that the communication was made in good faith, for a justifiable pur-

pose, and with a belief founded on reasonable grounds, of its truth. Probably cause for belief in truth of communication is necessary.

Deft. pleaded in substance that the occasion was conditionally privileged, and that he stated what he was informed was true. Court held that it was not enough that deft. should have believed but the belief must have been reasonable. Plff. may rebut conditional privilege by proof that deft. did not believe or that he had no reasonable ground for that belief. No authorities before this case and Clark v. Molynoux, ante. 22 Am. Law Rev. 237, note 3. N.H. view seems better view.

If occasion is conditionally privileged, plff. can rebut: 1. If communication exceeds reasonable necessities of occasion, either in matter or manner of publication; it is an abuse of the privilege. 2. If plff. proved that deft. did not honestly believe his statement to be true, and 3. according to some authorities, but denied by others, if plff. proves that deft. even though his statement be true, did not have reasonable grounds for his belief; or, 4. if plff. proves malice on deft's part; there is only one right motive - discharge of the duty or protection of the interest which gave rise to the occasion on which the conditional privilege rests. Plff. by proving that deft. acted from some motive other than that of discharging the duty or protecting the interest which gave rise to the occasion can rebut conditional privilege. One of the few cases in the law where motive becomes material. It would seem as if it must be the principal motive, though he might have had other motives also.

If a newspaper publishes a reasonably full report of a trial, it is not liable for libel. A fair report of a judicial proceeding is conditionally privileged. Same as to proceedings of Congress or State Legislatures. Will probably be ultimately held that all these are absolutely privileged.

Reports of public meetings, p. 479; English statute seems to go too far. Open question in U.S. as to whether reports of any body except legislature and courts of justie are conditionally privileged.

Public has a right of fair criticism and fair comment on a work published and sold to the public; test would be, whether jury thought the criticism was fair, if it was such as a reasonable man would have made. Fair comment of a public man on admitted facts is allowable if it is such as a reasonable man would have made. English

SECTION VII.

Conditional Privilege.

(a) Privileged Reports.

ASTON v. WILKES, p. 452, Q.B., 1960.

Plff. presented a petition to the House of Lords charging a high judicial officer with having thirty years before made a statement false to his own knowledge, in order to deceive a committee of the house of Commons and praying inquiry and removal of the officer if the charges were found true; a debate ensued on the presentation of the petition and the charges were utterly refuted. HELD, that this was a subject

of great public concern on which a writer in a public newspaper had a full right to comment, and the occasion was so far privileged that the comments would not be actionable so long as a jury should think them honest and made in a fair spirit, and such as were justified by the circumstances as disclosed in an accurate report of the debate. A faithful report in a public newspaper of a debate in either House of Parliament containing matter disparaging to the character of an individual which had been spoken in the coursed debate, is not actionable at the suit of the person whose character had been called in question. The publication is privileged on the same principle, viz., that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.

See Judge Holmes on Conditional Privilege in 8 Harv. Law Rev. This is a valuable case on this subject and also on the growth of the common law. The extract at the top of p. 487 is important, and is often quoted. It discusses the history of the English Law of Libel.

EVANS v. LEADER, p. 489, Exchequer, 1866.

Libel complained of was contained in the report of an examination of a debtor in custody. HELD, proceedings held in chambers before a registrar in bankruptcy under the bankruptcy act, etc. are judicial and in a public court. A fair report therefore of those proceedings is protected. This was a privileged report even though the proceedings were before an inferior court and not in a public place.

This case is right. It would seem to lay down that a fair report of matter in a court of justice is privileged even though irrelevant. The case holds the registrar's court to be public. No exceptions are to be made where the report is fair and it is for the public good that it be known. An officer making a court record public would be held to do it for such a purpose.

PETTIT v. [illegible], p. 471, Com. Pleas, 1878.

Three men who believed themselves to be aggrieved by the conduct of the plff. in respect to a supposed claim upon him for wages or salary, applied to a magistrate in open court for a summons under the master and workman's act. The magistrate declined to entertain the application, considering it matter for a civil and not a criminal court. The defd. afterwards published in a newspaper a report which the jury found to be a report of that which passed before the magistrate. HELD, this was a privileged report or publication. Although it was found in this case that the justice did not have power to issue a writ, he has jurisdiction enough to hear the testimony and so it is not the result of the trial that is reported, but the nature of the case.

The case is right. A fair report of ex parte proceedings is conditionally privileged. Proceedings are ex parte where one party only is represented. If the court should order a case to be held behind closed doors, Prof. Smith thinks a man might be punished for contempt of court if he reported it, but hardly because the matter was not privileged. This is doubtful however. Matter in U.S. Congress during a secret session is not privileged.

WILLIAMS v. LLOYD'S, p. 475, Court of App., 1877.

[illegible] was tried and convicted for conspiracy with the plff. to defraud underwriters. Plff. was served at the time of the trial, and the defence was that plff. was really the guilty party. Deft. published a report of the trial in a pamphlet giving the opening speech of counsel for the plff., and saying that it was borne out by the evidence and then giving an abstract of the speech for the defence and the judge's summing up in full. Plff. sues deft. for libel. HELD, it is a question for the jury whether the report was fair or not.

The general rule is that a report should be a fair account of proceedings as a whole. It must give with substantial accuracy, the general effect of all that passed, details may be omitted or summarized. It need not be a full report. Clark v. Lindsell 482. The fact that the report is found in a pamphlet makes no difference. A good test of what is a fair report is found on p. 478 of Lewis' Cases. The test is does the report give people who were not there a fair notion of what took place?

[illegible] v. [illegible], p. 478, Court of App., 1870.

A true report of the proceedings in a court of justice sent to a newspaper by an attorney in the case, not a reporter on the paper, is privileged not absolutely but conditionally; and if it be sent from a malicious motive an action lies.

PURCELL v. [illegible], p. 478, Court of App., 1877.

Plff. complained of was a report in deft's newspaper of charges unfounded in fact made ex parte against plff., the judicial officer of Union workhouses at a meeting of Board of Guardians of the same. It was admitted the report was accurate and bona fide. Verdict for plff. with leave to enter judgment for deft., if publication was privileged. HELD, the occasion of the publication was not privileged.

This is not a judicial proceeding, and so is distinguishable from the preceding cases. It is however a kind of inferior tribunal of a municipal nature. Prof. Smith is by no means prepared to say that he agrees with the case. He thinks it went too far, and that Parliament probably went too far the other way. See note p. 479.

[illegible] v. [illegible], p. 480, Mass., 1879.

Libel for publishing an article about the plff. in a medical journal which was under direction of deft. The article gave a brief acct. of the proceedings of a medical society which resulted in the expulsion of plff. for misconduct. The account given was substantially true. HELD, judgment on the verdict for deft. The proceedings were rightly characterized as quasi judicial.

Whatever may be the rule in England, a somewhat larger liberty may be claimed in this country and in Mass. This case is distinguishable from Purcell v. Sowler because there there was no trial, but merely ex parte charges, here there was a trial.

It is all right to report daily a judicial trial, suspending comments till the close.

Suppose A files an exceedingly defamatory declaration or bill against B during the vacation of the court. Suppose C, a newspaper man, publishes it. HELD, that it is not privileged. 127 Mass. 205. In that case the defence was part of a judicial proceeding. But the case supposed is not a judicial proceeding, but simply an act of the party himself, and so the reason to privilege it does not apply.

BARRIS v. CAMPBELL, p. 492, C.H., 1872.

Case for libel in accusing plff. of crime. Plea, that defts. were publishers of a newspaper and as such it was part of their duty to give to their readers such items of news as they might properly judge to be of interest and value to the community, and that they published the article complained of in good faith, believing, with good reason that it was true. HELD, that the plea is not a good defence. Deft's judgment of the propriety of the publication is not evidence of its lawfulness. It should have been alleged that the interests of the community wol would have been protected by the publication if true.

Law is definitely settled in accord, except where statutes cover. Newspaper publisher would be justified if any other citizen would be justified; mere fact of his business gives him no greater right than any one else in the community.

What reports are privileged? Answer: fair reports. What bodies? Answer: all public, judicial and legislative bodies though ex parte. Also nothing is libel which is merely comment on a subject fairly open to public comment. Such as matters of public welfare. In the case of printing a book, the matter is open to the public to read by the act o of the parties themselves; if such book is bad, short criticism is of held to be a fair comment and so justifiable. 4 R.& R.1197. See p. 447. - It was well settled until lately at least that a criminal prosecution would lie for defamation on a deceased if it injured the relations. Odgers on Def. stat. outline 275-8. L.R. 18 Q.B.D. Queen v. Londsheer holds that no civil action lies for slandering the dead. In the U.S. there is no case of a civil action being carried to the higher courts that Prof. Smith knows of. Probably there are none.

SECTION VII. (continued)

(b) Communications in the common interest of the maker and receiver, or in the interest of the maker alone.

BLACKMAN v. PUGH, p. 484, Com. Pleas, 1826.

Action for libel. Plff. had sold his stock in trade at auction and the proceeds were in the hands of the auctioneers. Deft., who had sold plff. goods on credit, procured his attorney to send a notice to auctioneers not to part with the money, plff. having committed an act of bankruptcy. This was the alleged libel. Judge charged that this was not a case in which good faith and belief in truth of the words were justification. HELD, that this was wrong. A communication made by a person immediately concerned in interest, in the subject matter to which it relates, to protect himself, believing it true and acting without

malicious motive is no libel.

Occasion was a matter of interest to the speaker.

LAWLESS v. THE ANGELO-EGYPTIAN COTTON CO., p. 486, Q.B., 1889.

Action for libel; defts. published of plff. their manager, in a report of the affairs of the company, these words:-"Shareholders will observe a charge of 1800£ for deficiency of stock, which the manager is responsible for; his accounts have been badly kept and have been rendered very irregularly." HELD, that as the report was a necessary and reasonable mode of communicating to the stockholders what they had a right to hear, the communication is prima facie privileged. And there being no evidence that it was not made bona fide and without malice, plff has no cause of action.

The communication here is of mutual interest. The publication by printing was held necessary and proper here. 21 Howard 202 has a dictum contra, but Prof. Smith thinks the case at bar right.

PADMORE v. LAWRENCE, p. 488, Q.B., 1840.

Case for slander, in charging plff. with having stolen a brooch belonging to deft's wife. It appeared that plff. had called at deft's house and soon afterwards the brooch was missed; that deft. then went to an in where plff. was and stated his suspicions in the presence of a third party; that plff. with her concurrence was searched by two women called in for the purpose, and to whom deft. repeated the charge. The brooch was not found but it turned out later that deft's wife had left it elsewhere. Judge charged that verdict must be for plff. if the words imputed felony, as they were clearly not privileged. HELD, that the question should have gone to the jury whether the charge was made bona fide. Charges otherwise slanderous are protected if made bona fide in the prosecution of an inquiry into a suspected crime.

HARRISON v. BUSH, p. 490, Q.B., 1855.

Action for libel. Plff. was a justice of the peace. Deft. had and others, inhabitants of the borough, sent a memorial to the Secy. of State, complaining of plff's conduct as magistrate, and making criminatory charges against him. HELD, that question was whether deft. acted bona fide. A communication madebona fide upon a matter in which the party has an interest or regarding which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which would be slanderous without this privilege. Deft. here certainly had both an interest and a duty.

Two sentences in this case contain a good summary of the law on the subject and are often quoted. They are "A communication made bona fide upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter which, without this privilege, would be slanderous and actionable." "Duty, in the proposed canon, cannot be confined to legal duties which may be enforced by indictment, action, or mandamus, but must include moral and social duties of imperfect obligation."

PROCTOR v. WEBSTER, p. 493, Q.B., 1885.

Libel. Plff. was sanitary inspector of the borough of Newark. Deft. wrote a letter to the Privy Council, charging plff. with irregularities in the exercise of his office and with taking a bribe. It was contended that the communication was absolutely privileged, but the judge charged that malice would make deft. liable. HELD, that this was correct. The charge was only prima facie privileged. Analogy of judicial proceedings does not apply.

SECTION VII. (continued)

(c) Communication made in the interest of the recipient.

CHILD v. AFFLECK, p. 495, King's Bench, 1829.

Libel. Plff. had been in the service of defts. Later another person employed her, and wrote to deft. for her character. Deft. wrote that while in her employ plff. frequently acted disgracefully, and since her dismissal has become a prostitute. Deft. afterwards made similar statements to the persons who had recommended plff. to her. Judge charged that letter was privileged, and communications to the persons who had recommended plff. were not evidence of malice. HELD, that this was correct. The wholeletter was prima facie privileged. The gist of defamation in giving character of a servant is actual malice, of which there was no evidence here.

Notice that here Mrs. A was asked for a statement concerning the girl. It is the statement of what the girl did or had been since she left Mrs. Affleck's employ that was the chief bone of contention in this case, but Prof. Smith thinks this is fairly in answer to the letter that Mrs. A received from Mrs. C.

COXHEAD v. RICHARDS, p. 497, Com. Pleas, 1846.

Action for libel. One case, 1st mate of a ship, wrote to deft. that plff. the captain, had been in a state of constant drunkeness during the voyage. Communication of this by deft. to shipowner was the libel alleged. The charges were found to be false. Verdict on general issue was for deft. as plff. had not shown malice on part of deft. Rule fo for a new trial refused by an evenly divided court, two judges holding that the communication was prima facie privileged, as a person, having information materially affecting the interests of another, and honestly communicating it, though having no personal interest. Other two judges that privilege did not extend so far, as here there was not even any moral duty on deft. to communicate.

Notice that here the deft. volunteered the information. The law is now settled in favor of this decision.

Notice on p. 501 "I cannot but think the moral duty not to publish of the latter (captain) defamatory matter which he did not know to be true, was quite as strong as the duty to communicate to the ship owner that which he believed to be true." This theory if carried out would destroy conditional privilege. The argument proves too much. The question is, is there a duty sometimes to communicate matter without being asked. The law is now settled by the weight of authority in favor

of Tindall's view, that it is often a duty to tell things unasked which you do not know to be true. Volunteered communications are no different in law from asked for communications.

Where there is an enquiry for the information, the jury is more likely to find for the deft. But the duty is not confined to legal duties, but is extended to moral and social duties - imperfect obligations.

It would seem as if information given in good faith where plff. is a political candidate ought to be conditionally privileged, but the authorities are in conflict. Chase, 28 Am. Law Rev., 848.

Joannes v. BENNETT, p. 504, Mass., 1862.

Action of tort for libels contained in letters to a woman to whom the plff. was then a suitor, and was afterwards married, endeavoring to dissuade her from entering into the marriage. The deft. was the former family minister and being at the house on a visit had been requested by the parents to write this letter. HELD, that the deft. was answerable since he had no interest in communicating this intelligence and had no duty to perform.

The statement was made after the deft. had ceased to be pastor to the family. The court decides nothing as to whether he was privileged when he was.

Why was not this really the same as a communication from the father, being at his request? The point is not noticed.

BENNETT v. DEACON, p. 508, Com. Pleas, 1846.

Case for slander of plff. in his trade. M.C. entered into a treaty of sale of timber to plff. Bennett, but before the sale had been finally agreed upon, deft. meeting C, asked C if he had sold. C said "I believe I have to Bennett." Deft. said: "If you let him have it, you will lose it, as he owes me 25£ and I am going to have him arrested." M.C. refused to sell. HELD, judgment for plff. the information was volunteered and not bona fide made in response to inquiries.

The court here were equally divided and so the verdict before the single justice stood.

SECTION VII.

(d) Excess of Privilege.

FOGGOD v. SPYRING, p. 508, Ex., 1834.

This case will be found at the end of this section.

DUNCOMBE v. DANIEL, p. 510, Q.B., 1888.

Libel. Plff. had been a candidate for Parliament. He had addressed a circular letter to the electors of the borough, of whom deft. was one, asking for their votes. In response to this circular deft. wrote a communication to the newspaper containing matter relating to the private conduct of the plff., imputing to him fraudulent conduct in certain money transactions. Later deft. wrote another similar communicatio Contended for deft. that as the communications were made by an elector to his brother electors regarding a candidate for office, they were privileged, and question of whether they were made bona fide should be left to jury. HELD, that it was not necessary to leave this question to the

jury, for however large may be the privilege of electors, it would be extravagant to suppose that they can justify publication to all the world of facts injurious to the character of a candidate.

Probably the better view is that taken in the next case. Assuming that the communication was privileged, if only made to voters, then it is a question for the jury whether the method of communication was reasonable or not.

MARKS v. BAKER, p. 512, Minn., 1891.

Libel. Plff., City Treasurer, was candidate for re-election. Defts., publishers of a newspaper, called attention in their columns to a discrepancy in the accounts of plff. The insinuation that plff. had embezzled was not true, as the accounts were all right, but deft. acted in good faith. HELD, that as the subject matter of the communication was one of public interest, it was prima facie privileged, and the defts. were not liable without malice.

Undoubtedly a communication to voters ought to be privileged, just as much as a communication to a firm about to hire a private person ought to be privileged. Private and public ought to make no difference. See 22 Am. Law Rev. 848 for discussion. Fair comment on candidates is a different question. Commenting on omitted facts is generally not actionable. In order to make a statement concerning a candidate privileged in states where such privilege exists, there must be an actual canvass for nomination, or something going on to show that the plff. intends to take office if elected.

Conditions other than the occasion.

Under this heading two questions present themselves. 1. Was the occasion privileged? 2. Were there other considerations present? Prof. Smith thinks that there are other conditions besides actual malice.

HATCH v. LAW, p. 514, Mass., 1870.

Post for publishing in the Taunton Daily Gazette the following notice concerning plff.: "George Hatch, having left my employ, and taken upon himself the privilege of collecting my bills, this is to give notice that he has nothing further to do with my business." Plff. requested court to rule deft. was not authorized in publishing notice in a newspaper. Judge left it to jury to say whether it was a reasonable mode of communication. Verdict for deft. HELD, that judge did right. Mere fact that notice came to persons not customers of deft. would not of itself defeat the privilege. It is a question of reasonableness.

The question here and in the next case is whether the communication exceeded the occasion. Communication must not exceed in matter. The statement must not be given greater publicity than is apparently reasonably necessary to discharge the duty or protect the interest giving to rise to the occasion.

This case is in conflict with Duncan v. Daniel and Prof. Smith thinks that on the question of privilege, it is nearer right.

WILLIAMSON v. BEAVER, p. 515, Com. Pleas, 1874.

Action for libel. The alleged libel was a charge of theft against

a girl contained in a telegram to her parents. HELD, that a communication which would be privileged if made by letter becomes unprivileged if sent through the telegraph office, because it is necessarily communicated to unprivileged persons.

A statute forbade clerks under penalty to disclose the contents of a message.

In this case the mode of communication was perhaps not reasonable. The communication must not exceed the occasion in time, place, matter or manner of publication. Malice is not the only case of excess of privilege. Sending the communication by telegraph was perhaps strong evidence of malice.

PULLMAN v. HILL, p. 518, Ct. of App., 1890.

Defts. dictated a libellous letter to typewriter and then sent it to Pullman & Co. Their clerk read it as it was directed to the firm. HELD, that there was a publication in both instances. Was it privileged? To make a remark privileged there must be an interest in hearing it to the hearer. Here there was clearly no interest in the typewriter or the clerk. Here there is no privilege.

Here the deft. according to the Court exceeded his privilegein the manner of publication. See Harv. Law Rev. p. 58.

Some firms would have to dictate their letters or go out of business to them such a rule would be a hardship.

Thompson v. FARRINGDON, p. 519, C.P., 1888.

Deft. wrote a libellous letter concerning plff. to a person to whom it would be a privileged communication. By mistake he sent it to wrong person. Question was, whether this defeated privilege. HELD, that it did not. There was no evidence of malice, which is essential to defeat privilege.

See Pollock on T., 245-8--comments adversely on this case.

The defence was that the deft. did not intend. Prof. Smith thinks the case is probably wrong. As a matter of fact the occasion was not privileged. Sending to Wood would hafe been privileged, but he did not send it to Wood. See L.R. 10 C.P. 102, also 60 Pun 219; which held that the intent was no defence.

In 24 N.E.R. 482; 159 Mass., 288 --- the Globe described a prisoner as F.P. Hanson, Real Estate & Ins. broker of So. Boston. In fact the prisoner was A.P.B.Hanson and H.P.Hanson brought suit. The court stood A to B for the deft. Which is the proper question? Who did the paper intend to speka of or, who would the public think the paper intended to speak of? Prof. Smith thinks the latter is the proper question. Suppose a statement regarding John Smith damages five J.Smiths? Prof. Smith thinks that each has an action. The question is not a question of intent but one of act. Holmes dissented agreeing with Prof. Smith.

TOOGOOD v. SPYRING, p. 508, Exchequer, 1834.

Deft. made libellous remarks baout plff. to a person to whom it was a privileged communication; a third party was present and heard it. Question was, did that defeat privilege. HELD, that it did not necessa-

rily. Not essential, that the party interested should be communicated with alone. If the words were not malicious, simple fact that there has been a casual bystander does not alter the nature of the communication.

Making the statement in the presence of a third party is not necessarily decisive. This case is cited perhaps more than any other in regard to a communication to a third party.

SUMMARY OF DEFAMATION.

Defamation in any language, oral or written, or any figure, tending to bring the person of whom it is published into hatred, ridicule, or disgrace, or to injure him in respect of his vocation.

Publication is the making defamation known to a third person.

Defamation is of two sorts; libel and slander. Slander consists of either (a) words imputing crime, or (b) words disparaging a person in his trade, business, office or profession, or (c) words imputing a loathsome disease, or (d) defamatory words not actionable per se, but causing special damage.

Libel is defamation propagated by printing, writing, pictures, or effigies. Slander consists of spoken defamation only.

Anything which is actionable per se .or on proof of special damage, when spoken, is actionable per se when written.

There is no good reason for the distinction between spoken defamatio and written defamation, but the fact is that printed defamation is action able per se. By printed defamation libel is here meant.

Truth is always a defence to an action for defamation, unless shut off by statute; therefore the defence of privilege presupposes the utterance of a defamatory charge, which was untrue, and which tended, in legal theory or in fact, to damage plff. L.R. 4 Q.B. 73.

A declaration for defamation must allege the falsity of the statement, but plff. need not prove its falsity, as the law will presume innocence of the party charged until the charge is proved. Defts. must prove its truth. Practically it is better not to set up the defence of truth unless you have an overwhelming confidence in your ability to prove it. for if it fails, the jury will always give larger damages.

Privilege rests on the fact that the interests of the public demand that one in a privileged position should speak what he believes to be true. In cases of absolute privilege, there is no liability for defamation not even for defamatory statements made with knowledge of their falsity, and from motives of ill will. The Chief Executive of the Nation, the Governors of States, Members of both national and state Legislatures, are privileged absolutely as to any statements made by them while acting in their official capacity.

Persons connected with the administration of justice, judges, jurors, parties, counsel and witnesses, are privileged absolutely as to relevant statements made in the course of judicial proceedings. L.R. 7 H.L. 755 and 758. (Case contains arguments applicable to the question as to why these clauses are thus privileged.)

Privilege is either absolute or conditional.

In conditional privilege there are two questions. 1. the occasion; 2. conditions other than the occasion.

As to the occasion. If the communication is made in the interest of the hearer as to an employee, it is conditionally privileged; if it is made in the interest of the speaker. Private interest or duty of the speaker, hearer, or both may justify making a statement as to another. The fact that information was volunteered will not take it out of privilege, though it may influence the jury as to the speaker's motive. The duty may be weither legal, social or moral.

On principle newspapers have no special privilege to publish matter as reports, for example, on the ground of interest to the public. They have the same right to give information as others have and no more.

Communications to public officials as to other persons, for example, subordinate officers, made for the purpose of redressing grievances, are privileged, if addressed to the officials having charge of such matters. It is disputed whether it is privileged when addressed by mistake to the wrong official. 70 L.T. n.s. 828.

There is a conflict of authority as to whether privilege applies to specific charges against a candidate for public office other than fair comment on his past services. 28 Am. Law Rev. 848.

As to conditions other than the occasion: if the occasion is privileged, privilege will be a defence. 1. Unless the communication exceeds the reasonable necessities of the occasion either in matter or manner of publication, (as communication by postal) or, 2, unless plff. proves that deft. did not honestly believe the statement to be true, or 3, (according to some authorities, denied by others) unless plff. proves that deft. even though believing his statement did not have reasonable ground for his belief. 56 Am. Rep. 280 says, "It is mistakes, not lies, that are protected by the doctrine of conditional privilege." Also, "It is not a duty on any man to circulate lies." Or 4, unless the deft. acts from a wrong motive, as he will not then be discharging a duty.

If the occasion is otherwise privileged, for example, conditionally privileged and reasonable necessities in matter or manner, the burden of proof is on the plff. to show that the deft. spoke without honest belief or from a wrong motive. Ames' Cases on T. 588 and 527. 28 Am. Law Rev. 867, note 3. Want of reasonable belief is important as evidence of the lack of honest belief.

Prof. Smith thinks it is sufficient to let a man off for a reasonabl belief without extending the excuse to an honest belief which is without foundation. The English case and the New Hampshire case in the reference just above are directly contra on the point of whether reasonable ground for belief must exist in addition to actual belief.

Now we come to one of the few cases in the Law of Torts where malice (or wrong motive, as Prof. Smith prefers to call it) is essential.

Actual malice is not confined to ill will. It means any improper motive. Malice means a wrongful act done intentionally without just

cause or excuse.

One must speak only from a dutyk or to protect the interests which gave rise to the occasion in order to take advantage of privilege. If he speaks from any other motive than duty, or to protect the interest which gave rise to the occasion, he speaks from an improper motive, that is, from what is called actual malice.

If the plff. makes out any one of these points, the defence of privilege is overthrown. Malice in fact must be shown by evidence other than that deft. was mistaken. Plff. must prove malice. If deft. knew the falsity of the statement it would be almost always conclusive proof of malice. The manner of publication and the language used may sometimes be sufficient to prove malice in fact. Honest belief does not of course exclude malice in fact. See Ames' Cases on Torts 585.

PRIVILEGED REPORTS.

The reports of certain bodies as courts of Justice, Legislatures, state and national, are conditionally privileged. There is a discussion as to whether the reports of societies, clubs, city governments, and other quasi public meetings, etc., are privileged. The tendency in the U. S. is to treat the reports of any of these quasi public meetings as privileged. In England they do not go so far.

Reports to be privileged need not be verbatim, but must be accurate and not be distorted. Conditional privilege, here as elsewhere, may be rebutted by proof of actual malice.

FAIR COMMENT.

On this see 4 F.& F. 1107 and 939. If a man states facts which are not in the book or play, it is not fair comment; but if he expresses merely an opinion, it is a question for the jury whether the comment goes beyond what fair minded persons might be reasonably inclined to say. That is, whether the comment is so strong that no fair minded, reasonable man could entertain it. 69 L.T.n.s. 846 and 847 per Lopes L.J.

Comment on undisputed facts would be fair although deft. argued to show certain conclusions. But if the paper set out new facts and new conclusions, the defence of fair comment would not be sufficient. Ames' Cases on T. 455, lines 7 to 10.

The defence of privileged communications cannot be maintained unless all the conditions exist. The burden of proof is on the plff. to rebut privilege. As before said although the occasion is conditionally privileged, other conditions must be present in order to allow deft. to take advantage of privilege. (Must not exceed reasonable necessities of the occasion in matter or manner of publication; must be honestly believed, etc.) It is sufficient if plff. overthrows any one of the essential conditions.

CHAPTER IV.

Malicious prosecution.

Malicious prosecution is a civil action for the malicious prosecution of a criminal charge. The law has made it hard to maintain such an action so as not to discourage prosecution. The essential elements for

the maintenance of the action are that:

1. There must have been a prosecution of a criminal charge;
2. The prosecution musthave terminated before the present action is brought;
3. The termination must have been favorable to the accused except in ex parte proceedings;
4. There was want of probable cause;
5. There was malice, so called; and
6. (According to some authorities) There was special damage unless the charge is one which, if made outside of legal proceedings would have been a slander actionable per se.

These requisites must all exist to make the deft. liable.

Section 1 (continued.)

(b) Want of Probable Cause.

FOSHAY v. FERGUSON, p. 548, N.Y., 1846.

Held, that proof of express malice is not enough without showing also the want of probable cause. Probable cause is a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offence. It does not turn on the actual guilt or innocence of the accused, but on the belief of the prosecutor concerning such guilt or innocence.

If one is actuated by express malice in the presecution of a crime, he is not liable if he had probable cause. The accuser need not have actual knowledge, but he must have received such information as would cause a reasonable man to act. 24 Atl. Sec. 1042 says, "Cautious man" is too strong a word, that the test is "Reasonable man." The burden is on the plff. to show want of probable cause, when the present deft. instituted the criminal prosecution. He need not show the deft. had legal evidence of his own knowledge; it is sufficient if he proceeds on information strong enough to give a reasonable degree of suspicion. In order to maintain malicious prosecution, it is not enough to prove express malice alone, or want of probable cause alone; must prove both. Want of probable cause cannot be inferred from the most explicit proof of express malice. But malice may be inferred from want of probable cause.

CLOON v. GERRY, p. 550, Mass., 1859.

HELD, that conviction by lower court, though reversed in upper court, is sufficient proof that the prosecution was instituted with probable cause, unless conviction was procured by the fraud of person instigating the suit.

The court held the conviction in a lower court as practically conclusive evidence of probable cause, though reversed in upper court. Prof. Smith thinks this wrong on principle. See Bigelow's torts 68 to 85; Stephen on malicius prosecution 101, 102; 22 Am. L.R. 392. The law on this point is conflicting, see the note on p. 551. Prof. Smith

thinks the court ought to tell the jury what probable cause is in law and then let the jury find whether on the facts it existed. See L.R. 4 H.L. 521. But the weight of authority is with this case.

On principle it would seem that the former decision ought not to have any bearing on the action, except to show that the present plff. was acquitted in the former action. (This is an essential element of an action for malicious prosecution.) But many things are regarded as prima facia proof of probable cause, although they ought not to be. How the case appears to another when presented to him has nothing to do with how the case appeared to the deft. when he instituted the prosecution, but the law holds that to be conclusive.

RAVENGA v. MACKINTOSH, p. 552, King's Bench, 1824.

HELD, that if a party lays all the facts of his case fairly before counsel and acts bona fide upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable for an action for malicious prosecution. But if he does not act bona fide ion the opinion, and does not believe he has any cause of action whatever, it is different.

If deft. intentionally omits facts in his statement to counsel, counsel's opinion is no defence to an action. Deft. is still liable. Suppose he unintentionally omits facts and thinks he has laid them all before counsel, the question has not been determined.

22 N.R.R. 918, accord.

The difficulty with the defence here was that deft. didn't believe what his counsel told him.

HADRICK v. HESLOP AND RAINE, p. 553, Q.B., 1848.

Case for malicious prosecution. It appeared that deft. heard of what plff. had done from another party, then stated he would indict plff; that his informant expressed an opinion that there was no ground for such indictment; on which deft. said that even if there were not, it would tie up plff's mouth for a while. Jury found that deft. did not believe he had reasonable ground for indicting and that he acted from improper motive. Verdict for plff. HELD, that question of deft's belief was rightly left to the jury where there is not belief, there certainly is not reasonable and probable cause.

Two things are necessary for probable cause. (1) Such facts as wouldinduce a reasonable man to act. (2) Deft. himself must actually believe that the accused is guilty. He must actually and reasonably believe. Clerk & Lindsell pp. 572 and 516.

"Want of probable cause" may not be inferred from express malice. This is recognized with regret in L.R. 4 H.L. 591. That want of probable cause is a question for the judge, is an anomaly, but it is law. Stephen on Malicious Prosecution.

SECTION I (continued.)

Malice.

MITCHELL v. JENKINS, p. 556, King's Bench, 1833.

Case for malicious arrest. It appeared that plff. was indebted to deft. in the sum of 45£ and that deft. owed plff. 16£; that deft; at the advice of his attorney, arrested plff. for whole sum instead of for balance. There was no evidence of malice, but judge told jury that, as plff. ought not to have been arrested for more thanthe balance, the law implied malice. Verdict for plff. Rule nisi. HELD, that malice in fact must be proved. But it may be inferred sometimes from the arrest itself, and that is always a question for the jury. New trial.

Want of probable cause was clear and the judge said that malice was to be implied, as the plff. ought not by law to have been arrested for more than the balance. That was wrong. The judge could neither nonsuit the plff. and say there was no malice, nor could he imply malice, but the question had to be left to the jury to find whether there was malice. The law dos not infer malice in malicious prosecution. The requirement of malice is an actual necessity there. From want of probable cause, the jury may infer malice, but they are not bound to do so.

VANDERBILT v. MATHIS, p. 55?, N.Y., 1?5?.

HELD, that want of probable cause and malice must both be proved. Want of probable cause may be sufficient under some circumstances, to justify jury in inferring malice in fact. But not always. And where it does not, malice must be expressly proved.

Malice must be found as a fact by jury. 67 L.T.n.s. 108 L.R. 1894, 2 Q.B., 71?. Deft. when he began prosecution had actual belief of guilt of plff., but no reasonable grounds for believing that plff. was guilty. HELD, that want of probable cause was not evidence of malice, when deft. actually believed the facts.

Ordinarily want of probabe cause is evidence ofmalice, because ordinarily a man will not believe the charge to be true.

In conditional privilege and malicious prosecution, malice has a meaning. In privileged communications it means improper motive.

In malicious prosecution malice means any motive other than the furtherance of justice. Bishop Non-Con. Law sec. 2?2, Clerk & Lindsell 51?

Here motive is material and must be proved as a fact. In malicious prosecution there is no legal implication of malice. Want of probable cause is not evidence of malice when there is actual belief of truth of charge. ? . Law Quar. Rev. 141-144 contends that malice ought not to be necessary to the action.

There is a complete immunity from action for defamation for charge made in the course of judicial proceedings, but the party accused can maintain malicious prosecution, but it is far more difficult. L.R. 11 Appeal Cases 252 (Bramwell.)

SECTION I (continued.)

(d) Damage.

BYNE v. MOORE, p. 562, Com. Pleas, 1?1?.

Action for a malicious prosecution in indicting the plff. for an assault and battery. The only evidence of plf. being that the bill was

preferred and not found, the Lord Chief Baron non-suited him. A rule nisi having been obtained and cause shown against it, HELD, plff. cannot recover because he has not proved he sustained any damage. If this action could be maintained, every bill which the grand jury threw out would be the ground of an action. Plff. was neither put to expense nor was his good fame affected.

If prosecution had been for a felony, decision would be otherwise; no proof of special damage necessary there. Distinction made, though doubtful if it exists, is: If charge complained of be so far scurrilous that an action of slander can be maintained for a similar verbal statement without proof of special damage, then the action for malicious prosecution may be maintained without special damage. Doubted by Clerk & L. and Cooley. Open question.

Stephen on Malicious Prosecution: It is for the jury to find first, what the facts are, and whether or not they constitute reasonable cause; question of whether the facts constitute probable cause, though often held to be for the court, is for the jury. Smith thinks action for malicious prosecution ought to be held difficult because as a rule men who bring such actions ought to have been convicted on the criminal charge, and also because there is no public prosecutor here.

Malice in malicious prosecution means about the same thng as in conditional privilege; anything but the right motive, not a desire to promote justice. Two cases where motive is important; 1. In rebutting the defence of conditional privilege, and, 2 in maintaining the action for malicious prosecution.

SECTION V.

Malicious Institution of a Civil Action without Arrest or Attachment.

WELMORE v. MELLINGER, p. 572, Iowa, 1884.

The petition alleges that defts. brought an action against plff. and his wife, charging in the petition that they two conspired and confederated together to defraud defts., by representing to defts., under the assumed name of Baker, that they were owners of certain lands which defts. were induced to purchase; that, in an action by one Woodward, a deed, purporting to be executed by him to be void, for the reason that it was forged and fraudulent, and that plff. herein and his wife well knew the condition of their title. It is further alleged that defts. herein served out a writ of attachment in the suit brought by them, which was levied upon real estate owned by plff's wife, and that defts. for a time prosecuted their action, but finally dismissed it at their own costs. Plff. alleges that he was not guilty of the frauds therein charged, and that the action was commenced and prosecuted by defts. maliciously and without probable cause. There was no evidence showing that the writ of attachment was levied upon any property owned by plff. HELD, no action will lie for the institution and prosecution of a civil action with malice and without probable cause, where there has been no arrest of the person or seizure of the property of deft., and no special injury sustained which would not necessarily result in all

suits prosecuted to recover for like causes of action.

In England the successful deft. is adequately compensated for the damage he sustains by the costs allowed him by the statutes. In this country that is not generally true in fact, though the theory is that he is. The ideal way would be would be for the legislature to enact that judges be allowed to tac substantial costs where the suit wasbrought out of malice and without probable cause.

SECTION VI.

Malicious Abuse of Process.

GRAINGER v. HILL, p. 580, Com. Pleas, 1838.

Plff. was arrested on a case and under the duress of his imprisonment was compelled to give up the possession of the ship's register. It was contended that he could not sue in respect of the malicious arrest, because it was not alleged to be without reasonable and probable cause, nor was the determination of the suit shown under which the arrest took place. HELD, in a special action on the case that the objection could not prevail, as the action was not for the malicious arrest, but for abusing the process of the law to effect an object not within its proper scope.

A legal process, notitself devoid of foundation, may be maliciously employed for some collateral object of extortion or oppression, and in such case, the injured party may have his right of action, although the proceedings of which he complains may not have terminated in his favor.

CHAPTER V.

Malicious injury to the plff. by influencing the conduct of a third person.

SECTION I.

By Inducing or Aiding a Third Person to commit a Breach of a Legal Duty to the Plff.

(a) The duty of a servant to his master.

HART v. ALDRIDGE, p. 594, King's Bench, 1774.

Trespass on the case for enticing away several of plff's servants who worked for him as journeymen shoemakers, bythe piece, a journeyman Contended for deft. that they were not plff's "servants." HELD, that whether he works by the day or by the piece, a journeyman attached to a particular master is his servant, and for enticing him away an action lies.

It is an inference that deft. knew of contract between plff. and parties. Great stress is laid here on fact that it was a contract of service. Idea is that a person who induces another to break contract of services, is in a worse position than one who induces party to break any other sort of a contract.

Motive was to benefit deft. in a way which necessarily injured plff. The act of third person to which deft. persuaded them was wrongful.

SECTION I (continued).

(b) The Duty of a Wife to her Husband.

TASKER v. STANLEY, p. 598, Mass., 1891.

Actions for procuring and entic

Actions for procuring and enticing the plff's wife to live separately from him. Neither declaration nor evidence was to effect that deft. spoke any falsehood, or that their conduct was unlawful for any other reason than its tendency to produce a separation. HELD, that in order to make a man who has no special influence or authority answerable for mere advice of this kind, because it is followed, it ought to appear that the advice was not honestly given, that it did not represent his real opinions, or that it was given from malevolent motives.

Precise point was whether deft. should be allowed to testify that his advice to the wife was given in good faith. Decision is that it should be allowed. If deft. brings about results which are in themselves tortious and actionable, or even separation by means which are wrong, but not actionable in themselves, there is an action. Holmes is right that deft. is not liable if he gave his advice in good faith from proper motives, but authorities are not unanimous.

SECTION I (continued.)

(c) The Duty of a Contractor.

LUMLEY v. GYE, p. 600, Q.B., 1853.

Declaration set forth an agreement between plff. and Miss Wagner for performance by her for three months at plff's theatre; and then stated that deft. maliciously enticed Miss W. to abandon her contract with plff. whereby plff. was damaged. Demurrer, on ground that it was not a case o of master and servant. HELD, that the principle of the action for enticing away servants can be applied to the case where deft. maliciously procures a party, who is under a contract to give personal services to plff. to break her contract, whereby plff. is injured. (Coleridge, J. dissenting.)

HELD, that the action would lie whether the service had been actuall entered upon or not, provided a valid contract for it was in existence.

Deft. was manager of a rival theatre. Deft. enticed and procured the singer to break her contract with plff. The action was not maintainable on ground of a servant under Stat. of Laborers. She was not a servant.

To maintain an action for malicious injury to plff. for deft's influencing the conduct of a third person, these two questions must be answered affirmatively: 1. Was there a legal duty owing by the third person to plff.? 2. Whether the legal relation of cause and effect existed between deft's act and plff's damage. Modern tendency is to say that Vicars v. Willcocks is wrong, and Lynch v. Knight is right (see vol. 2 p. 74). Deft. cannot escape on the ground that a third person did the act, where deft. intended that such act should follow, and where such result is natural and probable. Motive certainly was to damage plff. and probably secure the third person for deft's theatre. Here is a case of business competition, and yet deft. was held liable.

The case now stands for proposition that if one maliciously induce another to break a contract, injured contracting party can recover from the interfering party.

Maliciously means that the deft. intended to gain a benefit for himself, which he knew could only be obtained at the expense of the plff. Coleridge,J. dissented on ground that Miss Wagner was the last wrong-doer but the case comes within the exception, therefore, the act of the last wrong-doer was a consequence intended, or which ought to be foreseen by prior wrongdoer; prior wrongdoer is still responsible.

BOWEN v. HALL, p. 618, Court of App., 1881.

Action against deft. for maliciously inducing one of the parties to a contract to break his contract. The contract was one for personal service. It was a contract to make glazed brick for plff. for 5 years and for no one else. HELD, an action lies against a third person who maliciously induces another to break his contract of exclusive personal service with an employer which thereby would naturally cause, and did in fact cause, an injury to such employer, although the relation of master and servant may not strictly exist between the employer and the employed.

So held by Lord Selborne, L.C. and Brett L.J. affirming majority in Lumley & Gye, Lord Coleridge, C.J., dissentient.

One of the defts. (Hall) was plff's rival and another (Fletcher) was plff's manager. Hall and Fletcher induced one Peirson to break his contract with plff.

Clinches Lumley v. Gye. Act done was to obtain advantage for one of the defts. at expense of plff. Rejects Vicars v. Willcocks. If done honestly and without malicious motive, persuasion to break contract is not actionable.

Sec. 21 Am. Law Rev. 509. These two cases are very important.

SECTION I (continued.)

(d) The Duty of an Individual not to commit a Tort.

NEAMAN v. ZACHARY, p. 618, King's Bench, 1671.

Action sur le case. The plff. declared that the deft. was his shepherd, and that two of his sheep did estray, one of which being found again, the deft. affirmed to be the plffs., whereupon the plff. paid for the feeding of it, and caused it to be shorn and marked with his mark; and yet afterwards the deft. malitiose machinans to disgrace the plff., and knowing the said sheep to be the plff's, false and fraudulently affirmavit to the bailiff of the manor that had waifs and strays belonging to it, that this sheep was an estray; whereupon the bailiff seized it to his damage etc. HELD, that the action would lie, because the deft. by his false practice hath created a trouble, disgrace, and damage to the plff; and though the plff. have cause of action against the bailiff, yet this will not take off his action against the deft. in respect of the trouble and charge that he must undergo in the recovery against the bailiff, and Hales said that if one slander my title, whereby I am wrongfully disturbed in my possession, though I have remedy against the trespasser, I shall have an action against him that caused the disturbance.

Plff. could sue bailiff and also third person because third person induced bailiff by use of a falsehood to do this act; natural and probable consequence was that bailiff would do the act.

Note to E.J.Klous v. F. Hennessey and others, p. 620, R.I., 1881.

Prof. Smith thinks the case is wrong. Plffs. were not judgment creditors, but had a right to attach. Defts. assisted Kenney to secrete his property and so prevented plffs. from attaching. There is a conflic of authority on the question. Should have been left to jury to sav whether it wasprobable that plff. would have attached. One has a right to secure himself oy attachment and question is whether it was probable that plff. would have attached.

SECTION II.

By Influencing a RThird Person who owes No Legal Duty to the Plaintiff.

(c) By Force of Threats.

TARLETON v. McCAWLEY, p. 678, Nisi Prius, 1804.

Action on the case. Plff. sent a vessel to trade with natives on coast of Africa. Deft. maliciously intending to hinder natives from trading, fired from his ship into a cance of natives and killed one of them, whereby they were deterred from trading with plff. HELD, that this will support an action. If it had been an accidental thing, no action could have been maintained, but it is proved that deft. had expressed an intention not to permit any one to trade, until a debt due from the natives to himself was satisfied.

This is a case of force and so is a clear case. The means used were illegalper se. It is almost absolutely certain that the natives would enter into contract relations with plff. Deft. intended wrongfully that the natives should not enter into such relations. It is only necessary that the natives were about to trade with plff.

Suppose instead of pursuing violent methods, deft. merely persuaded thenatives not to trade, in good faith. No action.

ANONYMOUS, p. 679, Com. Pleas, 1410.

Trespass brought by masterof a grammar school against another for setting up a rival school, whereby plff. was damaged. HELD, that no action lies. It is damnum absque injuria. Plff. has no exclusive right.

This is a clear case of free competition. Suppose one of the masters had kept the boys away from other with a gun, then of course action would lie, means being illegal.

THE MOGUL STEAMSHIP CO., Ltd., v. MCGREGOR & CO., p. 680, Court of App., 1889.

Defts., a number of ship owners, formed a combine to drive competitors from the field. Offered very low rate in order to discourage other ship owners, and offered a special rebate to all who would deal exclusively with them. Whereby plff. was damaged. HELD, that intentional damage like this is actionable if done without just scause. But ther was just cause here. Bona fide competition, in the exercise of one's own trade, is allowable, even if result be to damage others. As the act done was lawful and means were lawful, fact of conspiracy is immaterial.

Not one person but a combination of persons; offered not only a low rate but also a rebate to all who would not deal with plff.; also a penalty was to be imposed upon those who broke the conditions upon which the rebate was paid. Had no personal ill will against Plffs. In Lumley v. Gye, plff. had a contractual interest violated; here plff. complains that other people were induced to refrain from entering into contract relations with him. If deft. employs unlawful means, it is actionable, as in Tarleton v. McGawley, ante. Defts. excused themselves on the ground of fair competition, Bowen holds that as they have not done anything unlawful, but had simply exercised lawful competition, they are not liable. Fact of combination does not change the matter. Here fact of combination is not per se unlawful. May be unlawful under certain circumstances. Case is the settled law of England, and the most important case. Practically followed in 28 Atl. Rep. (R.I.) 1. Principle applies simply to preventing persons from making contracts.

WALKER v. CRONIN, p. 894, Mass., 1871.

Tort for wilfully persuading employes of plff. and others who were about to enter employment of plff., to abandon the employment, whereby plff. suffered damage. HELD, that no one has a right to be protected from competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If deft's act in causing damage to plff. was wanton and malicious, without the justification of competition or service of any interest or lawful purpose, Plff. can recover.

The case came up on a demurrer to the declaration.

Does not allege that there were any existing contracts but that persons were induced to refrain from entering into contracts. Plff. alleges that deft's acts were intentionally wilful and without justifiable cause. Where the defts. had not the excuse of business competition. Court expressly avoids saying what would be justifiable cause.

Suppose A in good faith advises B to break contract with C., has B an action against A? Pollock 480 - 481, says no. Holmes, 8 Harv. L.R. 1[illegible], seems to think differently. Prof. Smith thinks former is right.

Persuasion, not amounting to coercion and not having the element of conspiracy to induce person not to enter into contracts with another is not actionable.

21 Am. Law Rev. 525 - 529.

TEMPERTON v. RUSSELL, p. 897, Court of App., 1893.

Plff., a mason and builder, sued defts., officers of trade unions, for unlawfully and maliciously procuring certain persons to break contracts with plff. and other persons not to enter into contract with plff. whereby plff. was damaged. HELD, that as between themselves members of trades unions have a perfect right to work for whom they will, on what terms they will. But here they went beyond that and brought influences to bear on outsiders to prevent their dealing with plff., in order to injure plff. This was unjustifiable. Inducing men to break contracts with plff., and inducing men not to enter into contracts with him, are not to be distinguished. Either is actionable, if done maliciously.

Fact that there was a combination is material. A combination of two or more persons to induce others not to deal with a particular individual or enter into contracts with him, if done with intention to injure him, is an actionable wrong, if damage results to him therefrom.

Temperton v. Russell, Lumley v. Gye, Bowen v. Hall, and Vogul Steamship Co. v. McGregor are the four most important cases on the subject in England.

Defts. were not competitors in business with Temperton. Labor Union had trouble first with brother of plff. Ulterior motive was to coerce some one else. Might be said that defts. were business antagonists with Myers & Temperton in buying and selling labor. Court lays great stress on the combination. Apparently decides that a combination to induce persons to refrain from entering into contracts with another is actionable.

Two points here: 1, same as in Lumley v. Gye, other, conspiracy to prevent persons entering into contracts with plff. What element is there here that was not present in Vogul Steamship case? Difference in the means used, here there were threats. 8 Harv. L. R. 78.

Prof. Smith regards it as an open question whether an act not actionable, if done by one, is actionable if done by a combination.

The fact that several combine may make them liable criminally where one alone would not be. The combination alone makes them liable. No civil suit is maintainable for a bare combination. The question is whether there may be a civil action for conspiring to do and doing an act which if done by one person alone, would not be actionable civilly. Ames 617, 705 - 706 and 801. The general drift of the text books is that an act when done by one person alone is not actionable it is not when done by several. Bishop Non-Con. Law 855-860.

Why allege conspiracy in a civil action? Because 1. It will enhance the damages, the conspiracy having aggravated the wrong. 2. It tends to facilitate the proof of the existence of malice. Pollock 281. 3. Conspiracy is relied on to get the benefit of a rule of evidence. The rule is, that if a conspiracy is established, then each conspirator's testimony is evidence against all.

CHAPTER VII.

Malicious Use of One's Property in order to injure the Plaintiff.

CARSLEY v. WHITE, p. 764, Maine, 1892.

Deft. dug a well on his own land which has the effect of cutting off the sources of supply for spring on plff's land, whereby the spring became dry. In an action for damages, the judge instructed the jury that deft. was liable if the well was dug solely for the purpose of injuring the plff. Plff. had a verdict. Held, that while deft's act would not be actionable if done in good faith for his own convenience, he is liable if it was done solely for the purpose of injuring another. But judgment must be reversed as the verdict was against the evidence.

This case holds that there are instances where acts may be so outrageous that an action may be allowed. At least four questions arise:

1. Nature of plff's right or interest; is that interest one which the law will take notice of and protect? Weight of authority is that plff's interest in having other persons enter into contract relations with him is an interest which under certain circumstances the law would protect.
2. Did deft. use means which are tortious?
3. Was plff. suffered damage in the legal sense?
4. Whether relation of legal cause subsists between deft's act and plff's damage.

Most important point is, what means were used? Holmes in 2 Harv. L R. Means per se unlawful or means not per se unlawful, as advice or persuasion.

The subject has three difficulties. 1. What is a wrong motive, and what are right motives? 2. Will deft's wrong motive make something unlawful or actionable which would not otherwise have been actionable? 3. If there is a combination, is a combination enough to give right of action?

As to first point - Often said that a lawful act cannot be unlawful merely because it is done from a wrong motive. Statement is right, but is simply begging the question. Question is-whether the motive may make the differ-nce between lawfulness and unlawfulness. Act done by man in the use of his own land which would be unlawful if done from a right motive, would not be lawful because done from a wrong motive according to weight of authority. As to motive done to influence conduct of third persons: - Tendency now to hold that wrong motives may make something actionable which would not otherwise be actionable. Weight of authority is also that if act done by one man would not be actionable, a combination to do it will not be. 2 Harv. L.R. note 1. A combination alone if not followed by damage, is not actionable at civil law.